

No. 83-997-CFX
Status: GRANTED

Title: Trans World Airlines, Inc., Petitioner
v.
Harold H. Thurston, et al.

Docketed:
December 16, 1983

Vide:
83-1325

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Oechler Jr., Henry J.

Counsel for respondent: Solicitor General, Fay, Raymond C.,
Abram, Michael E.

Entry	Date	Note	Proceedings and Orders
1	Dec 16 1983	G	Petition for writ of certiorari filed.
3	Jan 16 1984		Order extending time to file response to petition until February 19, 1984.
6	Jan 17 1984		Brief of respondents Harold H. Thurston, et al. in opposition filed.
7	Jan 25 1984	G	Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae filed.
8	Jan 25 1984		Brief of respondent Air Line Pilots Assn., Intl. in opposition filed.
9	Feb 1 1984		Brief of respondent EEOC in opposition filed.
10	Feb 3 1984		Reply brief of petitioner TWA filed.
11	Feb 8 1984		DISTRIBUTED. February 24, 1984
12	Feb 27 1984		Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae GRANTED.
13	Feb 27 1984		Petition GRANTED. *****
14	Mar 9 1984	G	Motion of the parties to dispense with printing the joint appendix filed.
15	Mar 19 1984		Motion of the parties to dispense with printing the joint appendix GRANTED.
16	Apr 2 1984		Case is consolidated with 83-1325, and a total of one hour is allotted for oral argument.
18	Apr 10 1984		Order extending time to file brief of petitioner on the merits until May 17, 1984.
19	May 2 1984	G	Motion of United Air Lines, Inc. for leave to file a brief as amicus curiae filed.
21	May 15 1984	G	Motion of the Solicitor General for divided argument filed.
22	May 21 1984		Motion of United Air Lines, Inc. for leave to file a brief as amicus curiae GRANTED.
23	May 17 1984		Brief of petitioner TWA filed. VIDED.
24	May 17 1984	G	Motion of Equal Employment Advisory Council for leave to file a brief as amicus curiae filed.
25	May 25 1984	G	Motion of Trans World Airlines, Inc. for divided argument filed.
26	May 29 1984		Response of Air Line Pilots Association to motion of the Solicitor General for divided argument filed.
28	May 29 1984	G	Motion of Air Line Pilots Association for divided argument filed.
29	Jun 4 1984		Motion of Equal Employment Advisory Council for leave to file a brief as amicus curiae GRANTED.

No. 83-997-CFX

Entry	Date	Note	Proceedings and Orders
30	Jun 4 1984		Motion of the Solicitor General for divided argument GRANTED.
31	Jun 4 1984		Motion of Trans World Airlines, Inc. for divided argument GRANTED. and a total of fifteen minutes is allotted for that purpose.
32	Jun 4 1984		Motion of Air Line Pilots Association for divided argument GRANTED. and a total of fifteen minutes is allotted for that purpose.
33	May 31 1984		Brief of petitioner Air Line Pilots Association International filed. VIDED.
34	May 31 1984	G	Motion of Chamber of Commerce of the United States of America for leave to file a brief as amicus curiae filed.
36	Jun 1 1984		Order extending time to file brief of respondent on the merits until June 30, 1984.
37	Jun 11 1984		Motion of Chamber of Commerce of the United States of America for leave to file a brief as amicus curiae GRANTED.
38	Jun 28 1984		Order further extending time to file brief of respondent on the merits until July 7, 1984.
39	Jul 6 1984		Brief of respondent Air Line Pilots Association, International filed. VIDED.
40	Jul 6 1984		Brief of respondent EEOC filed. VIDED.
41	Jul 6 1984	G	Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae filed.
42	Jul 11 1984		Brief of respondents Harold H. Thurston, et al. filed. VIDED.
44	Jul 20 1984		Record filed.
45	Aug 8 1984		CIRCULATED.
46	Aug 9 1984		Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae GRANTED.
47	Aug 10 1984		SET FOR ARGUMENT. Tuesday, October 9, 1984. (3rd case) This case is consolidated with No. 83-1325. (1 hr.)
48	Sep 24 1984	X	Reply brief of petitioner TWA filed. VIDED.
49	Sep 27 1984	X	Reply brief of respondent EEOC filed. VIDED.
50	Oct 2 1984	X	Reply brief of respondent Air Line Pilots Assn. filed.
51	Oct 9 1984		ARGUED.

83-997

No. _____

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~~FILED~~

DEC 16 1983

ALEXANDER L. STEVAS.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,

Petitioner,

—v.—

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A.
PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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QUESTIONS PRESENTED

1. Whether specific intent to discriminate is necessary to establish a "willful" violation under the Age Discrimination in Employment Act, an issue as to which the Courts of Appeals are sharply divided?

2. Whether a labor union found to have jointly violated the Age Discrimination in Employment Act with an employer can nonetheless be absolved as a matter of law from any liability for back pay?

3. Whether the Age Discrimination in Employment Act requires an employer to accommodate employees for an age-related reason merely because it provides accommodation for non-age-related reasons?

PARTIES

Trans World Airlines, Inc., Harold H. Thurston, Christopher J. Clark, C.A. Parkhill and the Air Line Pilots Association, International were all parties to the decision sought to be reviewed here. In addition, the Equal Employment Opportunity Commission and Nicholas Vasilaros, *et al.*, were intervenors in the court below.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. ____

TRANS WORLD AIRLINES, INC.,

Petitioner,

—v.—

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A.
PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Petitioner Trans World Airlines, Inc. ("TWA")* respectfully prays that a writ of certiorari issue to review the judgment (with one judge dissenting) of the United States Court of Appeals for the Second Circuit entered on August 1, 1983, reversing the judgment by the district court.

* As required by Rule 28.1 of this Court, TWA states that it is presently a subsidiary of Trans World Corporation, of which Hilton International Co., Canteen Corporation, Spartan Food Systems, Inc. and Century 21 Real Estate Corporation are also subsidiaries.

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 713 F.2d 940 and appears in the Appendix hereto at page A-1. The opinion of the United States District Court for the Southern District of New York is officially reported at 547 F. Supp. 1221 and appears in the Appendix hereto at page A-44.

JURISDICTION

The judgment of the Court of Appeals was entered on August 1, 1983. Rehearing and suggestion for rehearing in banc was denied on November 10, 1983. This petition is filed within 90 days of the date of denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 4(a) of the Age Discrimination in Employment Act ("ADEA") provides (29 U.S.C. § 623(a)):

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

Section 4(c) of the ADEA provides (29 U.S.C. § 623(c)):

It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Sections 4(f)(1) and (2) of the ADEA provide (29 U.S.C. §§ 623(f)(1) and (2)):

It shall not be unlawful for an employer, employment agency or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual.

Section 7(b) of the ADEA provides (29 U.S.C. § 626(b)):

The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217), and subsection (c) of this section. Any act prohibited under section 4 of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 215). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216, 217): *Provided*, That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

Section 12(a) of the ADEA provides (29 U.S.C. § 631(a)):

The prohibitions in this Act shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

Part 121.383(c) of the Federal Air Regulations provides (14 C.F.R. § 121.383(c)):

No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this

part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.

STATEMENT OF THE CASE

This case had its genesis in the passage of the 1978 amendments to the ADEA which were signed into law on April 6, 1978 (P.L. 95-256). These amendments prohibited, *inter alia*, an employee's involuntary retirement before the age of 70 by reason of a bona fide employee benefit plan. The ADEA, however, still allowed retirement before the age of 70:

(1) where "age [was] a bona fide occupational qualification reasonably necessary to the normal operation of the particular business;" and

(2) where the retirement was in accordance with (i) "the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance plan;" (ii) was "not a subterfuge to evade the purposes of [the ADEA];" and (iii) was not as a result "of the age of [the] individual." (29 U.S.C. § 623(f)).

As a result of these amendments to the ADEA, TWA began a review of its pilot collective bargaining agreement (which included its retirement plan) to ensure that the Company was complying with the new statute. Insofar as Captains and First Officers (co-pilots) were concerned, retirement from these positions at age 60 was mandated by a regulation of the Federal Aviation Administration ("FAA"). That regulation provides "[n]o person may serve as a pilot . . . if that person has reached his 60th birthday" (14 C.F.R. § 121.383(c)), and such an age limitation is a "bona fide occupational qualification" ("BFOQ") for the purposes of the ADEA (A-7 to A-8).

However, there is also a third cockpit crewmember on most jet aircraft. He is the Flight Engineer, and there is no FAA

regulation limiting that position to persons below the age of 60 (A-6 to A-7). Accordingly, TWA announced on August 10, 1978 that "any cockpit crew member who [was] in a Flight Engineer status at age 60 may not be compelled to retire." TWA's policy also recognized that those who wanted to work beyond age 60 would "be governed by the provisions of the current Working Agreement. . . ." (J.A. 425).*

On the same day, August 10, 1978, the pilot's union, the Air Line Pilots Association ("ALPA"), filed suit against the Company in *ALPA v. TWA*.** The complaint alleged that TWA had gone too far by allowing anyone to serve past age 60 in alleged breach of the collective bargaining agreement (J.A. 108-15). Soon thereafter, a group of TWA Captains mandatorily retired at age 60 because there were no Flight Engineer vacancies prior to their 60th birthday also filed suit in *Thurston v. TWA and ALPA*. Their complaint alleged, *inter alia*, that TWA's "age 60" policy had not gone far enough to accommodate them and was therefore in violation of the ADEA (J.A. 58-73). The Equal Employment Opportunity Commission ("EEOC") was subsequently permitted to intervene in *Thurston* as a plaintiff-intervenor purporting to represent others similarly situated,*** and *Thurston* was consolidated with *ALPA* for decision.

* References to "J.A. ____" are to the Joint Appendix filed in the Second Circuit. Unless otherwise noted, emphasis in quotations is added.

** A group of "career" or permanent Flight Engineers, Nicholas Vasilarios, *et al.*, was also permitted to intervene in *ALPA v. TWA* on the side of the Company (A-49 n.3).

*** In view of this Court's recent decision in *INS v. Chadha*, ____ U.S. ____, 103 S. Ct. 2764 (1983), and the subsequent decision in *EEOC v. Allstate Ins. Co.*, 570 F. Supp. 1224 (S.D. Miss. 1983), a threshold question arises whether the EEOC has the authority to enforce the ADEA. In filing this petition, TWA reserves all rights in this regard.

By an order dated September 13, 1982, Judge Duffy of the Southern District of New York granted TWA's motion for summary judgment in both *ALPA* and *Thurston* (A-44 to A-61). Insofar as the *Thurston* and EEOC plaintiffs were concerned, Judge Duffy ruled that they "cannot establish a *prima facie* case of discrimination solely because no job vacancy existed at the time they applied and were eligible for the job. TWA was legally obligated to remove these pilots at age sixty under the FAA regulations. TWA was not obligated, however, to offer these ex-pilots jobs which did not exist. To the extent jobs existed, TWA was justified in relying upon a seniority bidding system." (A-57).

On appeal, the panel unanimously affirmed Judge Duffy's decision in *ALPA v. TWA* (A-13 to A-21). However, a majority of the panel reversed his holding in *Thurston* and directed that summary judgment be entered in favor of the *Thurston* and EEOC plaintiffs. Judge Mansfield, in an opinion joined by Judge Waterman, held that "because TWA routinely accommodates other employees who seek to downgrade to flight engineer for *non-age* reasons and has failed to come forward with a permissible reason for its refusal to accord the *same* treatment to age-60 captains and first officers, the *Thurston* litigants and the EEOC claimants must prevail on their ADEA claim." (A-31).

In fashioning its relief against TWA, the majority ruled that TWA's actions constituted a "willful" violation under Section 7(b) of the ADEA (29 U.S.C. § 626(b)), thereby entitling plaintiffs to "[l]iquidated or double damages" (A-33). The court's finding of "willfulness" was predicated on its view that "in a case based on discriminatory treatment, such as the present one, plaintiffs need not prove a specific intent to violate the ADEA; it is sufficient to establish that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." (A-33). Significant liability for liquidated damages was thus imposed against TWA even though there had never been an evidentiary hearing on the issue of intent or "willfulness."

In its initial decision, the majority also imposed money liability against ALPA. It found that while the statute "precludes a monetary damage award against ALPA," the plaintiffs were "entitled to recover back pay, an equitable remedy, against the union." (A-34). However, in a subsequent "Errata Sheet" released after the denial of the petitions for rehearing (A-37 to A-39),* the court deleted the entire paragraph relating to its prior holding that the plaintiffs were entitled to recover back pay from ALPA. This deletion resulted in making TWA, the employer defendant, solely liable for all payment of money under the court's ruling.

In dissent, Judge Van Graafeiland noted that the majority's attempt to compare TWA's treatment of its employees for non-age reasons with its employees for age reasons was "like comparing apples with oranges." He did not "believe" that was what "Congress intended" by its enactment of the ADEA (A-35 to A-36). He concluded:

"Apparently, TWA is the only trunk airline that *voluntarily* has permitted pilots over 60 to continue working as flight engineers. *Instead of receiving commendation for what it has done*, TWA is held liable as a matter of law for age discrimination." (A-36).

* The actual "Errata Sheet" is printed at A-37, and the resulting changes in the decision are reflected in the markings made by TWA for the convenience of this Court at A-38 to A-39.

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD RESOLVE THE CLEAR CONFLICT IN THE COURTS OF APPEALS AS TO WHAT CONSTITUTES A "WILLFUL" VIOLATION UNDER THE ADEA

This case brings to this Court the perfect opportunity to resolve a clear conflict among Circuits and establish uniformity as to what constitutes a "willful" violation under the ADEA, thereby entitling a plaintiff to liquidated damages. Absent any evidentiary hearing and without even benefit of briefing on the subject, the majority below has adopted a standard of "willfulness" under Section 7(b) of the ADEA which is broader than any other Circuit Court of Appeals and which clearly contravenes the standard adopted by at least two other Circuits.

As the court below noted, liquidated damages under the ADEA are "double damages . . . equal to the pecuniary losses sustained by way of lost wages" (A-33). Under Section 7(b) of the ADEA (29 U.S.C. § 626(b)), Congress has mandated that "liquidated damages shall be payable *only* in cases of *willful* violations of this Act." Congress has thereby clearly established a two-tiered level of liability under the ADEA, one non-willful and one willful.*

* Accord *Lorillard v. Pons*, 434 U.S. 575, 581 (1978), where this Court stated that "Congress altered the circumstances under which such awards [for liquidated damages] would be available in ADEA actions by mandating that such damages be awarded *only where* the violation of the ADEA is willful." It should be noted that certiorari was granted in *Lorillard*, this Court's first examination of the ADEA, "to resolve the conflict in the Circuits" (*id.* at 577) on whether the ADEA provided a right to jury trial. Since then, this Court has dealt with only a few procedural questions under the ADEA. See, e.g., *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979). This petition, if granted, would allow the Court to provide some much-needed substantive interpretation of the ADEA.

Nevertheless, the majority below found that in order to establish willfulness "in a case based on discriminatory treatment, . . . it is sufficient to establish that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." (A-33). The majority further emasculates the statutory requirement of "willful[ness]" by indicating that any time there is a finding of disparate treatment (even when, as here, it is admittedly inferred) (A-24), liquidated damages *automatically* follow so long as the defendant is *merely aware* of the existence of the statute. This results from the majority's view that "[i]n a discriminatory treatment case . . . an employer's action, if taken *because of* an impermissible factor such as age, cannot be the result of negligence, mistake, or other innocent reason." (A-33 to A-34) (emphasis in original).*

The majority has thereby adopted a standard for "willfulness" under the ADEA where the penalty of liquidated damages will follow *a fortiori* from a finding of disparate treatment. This is clearly contrary to at least two Circuits which hold that in order to establish "willfulness" under the ADEA, there must be a finding the defendant *knew* he was actually *violating* the statute.

In the First Circuit, an "act is done 'willfully' if done voluntarily and intentionally, *and with the specific intent to do something the law forbids*; that is to say, with bad purpose either to disobey or disregard the law." *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020 n.27 (1st Cir. 1979). The Seventh Circuit has agreed "that a finding of willfulness should be *only if* there is some showing as to the defendant's *knowledge of the illegality* of his actions." *Syvock v. Milwaukee Boiler Mfg.*

* After quoting the test cited above, the majority's decision simply states: "Applying these principles, TWA was clearly aware of the 1978 ADEA amendments; indeed it was required to post them, 29 U.S.C. § 627." (A-34). No finding was made that TWA knowingly acted with specific intent to discriminate, and indeed, it is undisputed that at least 83% of those Captains seeking to serve as Flight Engineers beyond age 60 have succeeded in that regard (A-61 n.8).

Co., 665 F.2d 149, 155 (7th Cir. 1981). TWA submits that these cases correctly interpret the ADEA and that the proper standard for "willfulness" is that an act be done "with the specific intent to do something the [ADEA] forbids." *Loeb, supra*.

The merit of such a test was recognized by the court in *Syvock* (pp. 154-55). There, the court specifically noted how its "focus on the defendant's state of mind" differed from the misnomered "deliberate, intentional, and knowing" test adopted by the Third Circuit in *Wehr v. Burroughs Corp.*, 619 F.2d 276, 283 (3d Cir. 1980), and followed by the Ninth Circuit in *Kelly v. American Standard, Inc.*, 640 F.2d 974, 980 (9th Cir. 1980), and the Sixth Circuit in *Blackwell v. Sun Electric Co.*, 696 F.2d 1176, 1183-85 (6th Cir. 1983). In these Circuits, it "is sufficient to prove" willfulness by showing that "the company discharged the employee because of age and that the discharge was voluntary and not accidental, mistaken or inadvertent." *Wehr, supra*, 619 F.2d at 283.*

* Alternatively, the *Wehr* court said that "it would also be sufficient to prove that the discharge was precipitated in reckless disregard of consequences." (*Id.*) This view has been adopted by the Sixth Circuit in *Blackwell, supra*, 696 F.2d at 1184, and apparently by the majority below (A-33). However, it has been specifically rejected by the Ninth Circuit in *Kelly, supra*, 640 F.2d at 980 n.7.

Other Circuits have adopted different standards. The Fourth Circuit has "recently rejected" the *Syvock* standard and merely requires that "an employer acts willfully and subjects himself to [liability] if he knows or has reason to know, that his conduct is governed by [the ADEA]." *Crosland v. Charlotte Eye, Ear and Throat Hospital*, 686 F.2d 208, 217 (4th Cir. 1982). On the other hand, the Fifth Circuit in *Hays v. Republic Steel Corp.*, 531 F.2d 1307, 1311 (5th Cir. 1976), has indicated that an employer has a defense of "good faith" to any "willful" violation claim. This defense, however, has been specifically rejected by at least three other Circuits. See *Kelly, supra*, 640 F.2d at 981-82, and cases cited therein.

For a good summary of the confusion generated by the divergent standards of "willfulness" in the different Circuits, see *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1165 n.24 (S.D.N.Y.

(Footnote continued on following page)

These three Circuits all adopted such a standard after a full trial. In contrast, the majority here has adopted a standard requiring even less of a showing of discriminatory animus without any such trial and admittedly on the basis of nothing more than "an inference of discriminatory motive" (A-24).*

This standard of imposing liability for willfulness and double damages simply upon proof of disparate treatment poses a stark contrast with decisions of the First and Seventh Circuits. It also represents an even easier burden to establish "willfulness" liability than that presently followed by the Third, Sixth and Ninth Circuits. Considering the heightened prominence the ADEA has acquired in civil rights litigation, there exists a very obvious need for this Court to establish a uniform rule removing the confusion and disarray presently existing among the Circuits, and this case is an excellent vehicle to resolve this important issue.

1983), where Judge Weinfeld of the Southern District of New York notes how the Circuits "differ as to the interpretation of the term." Judge Weinfeld "subscribes to the view that to entitle plaintiff to receive liquidated damages he must establish that the defendant acted with *knowledge of the illegality* of his action." (*Id.* at 1165). Accord *Whittlesey v. Union Carbide Corp.*, 567 F. Supp. 1320, 1330 (S.D.N.Y. 1983). Both of these recent cases therefore adopt the *Loeb* and *Syvock* test of the First and Seventh Circuits.

* In almost all ADEA cases in which liability has been found, including the case here, plaintiffs have proceeded under the theory of "disparate treatment" articulated in *Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977). The holding of the court below providing recovery of double damages in ADEA cases simply upon a showing of disparate treatment thus has wide application to virtually all ADEA litigants, now and in the future. Because of the vast repercussions of the standard announced below, the issue would be ripe for resolution by this Court even if the Circuits were not so divided.

II

THERE IS AN IMPORTANT QUESTION OF FEDERAL LAW AS TO WHETHER A LABOR UNION FOUND TO HAVE VIOLATED THE ADEA CAN NONETHELESS BE ABSOLVED OF LIABILITY FOR BACK PAY

A. The Holding of the Court Below

In a dramatic about-face, the majority first held ALPA jointly liable with TWA for "back pay, an equitable remedy" (A-34), and then, after denying petitions for rehearing, it issued a terse "Errata Sheet" *deleting* all references to ALPA's liability for monetary relief (A-37 to A-39). In its "corrected" decision, the Second Circuit strikes new ground in holding that "the ADEA . . . does not permit actions to recover monetary damages, including back pay, against a labor organization." (A-38). The Second Circuit thus becomes the first Circuit Court to hold employers *solely* liable for monetary relief under the ADEA even where, as here, the labor organization is found also to have violated the statute.*

* Only two district courts have squarely addressed the issue, with different results. In *EEOC v. ALPA*, 489 F. Supp. 1003, 1009 (D. Minn. 1980), *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981), the court relied on the language of 29 U.S.C. § 626(b) and "analogous case law under Title VII" in reaching its holding that a "union as well as employer can be held liable for backpay awards." A contrary result obtained in *Neuman v. Northwest Airlines*, 28 FEP Cases 1488, 1491 (N.D. Ill. 1982).

The majority's "Errata Sheet" added as authority for its holding a citation to *Brennan v. Emerald Renovators, Inc.*, 410 F. Supp. 1057, 1059 n.5 (S.D.N.Y. 1975). That case, however, dealt not with the ADEA but with the Equal Pay Act, 29 U.S.C. § 206, and simply held that an employer could not maintain a private cause of action against a labor organization for contribution or indemnity.

The *Brennan* holding was subsequently adopted by this Court in *Northwest Airlines, Inc. v. TWU*, 451 U.S. 77 (1981), but the question of contribution continues to be inapposite to whether a co-defendant union can be held accountable for back pay liability under the ADEA.

(Footnote continued on following page)

The changed holding below receives no support in the language and purpose of the ADEA to provide employee redress from both labor organizations and employers by giving courts broad power "to grant such legal or equitable relief as may be appropriate" (29 U.S.C. § 626(b)). Unless corrected, the holding below will be inconsistent with "[t]he governing principle" of national labor policy "to apportion liability between the employer and the union according to the damage caused by the fault of each." *Vaca v. Sipes*, 386 U.S. 171, 197 (1967). Furthermore, without any support in the legislative history, the holding below attributes to Congress an intent to shield unions from monetary liability for the natural consequences of discriminatory acts.

B. The Holding Urged by Petitioner Is Supported by the Clear Purposes of the ADEA

The overriding purposes of the ADEA are "to promote employment of older persons based on their ability rather than age [and] to prohibit arbitrary age discrimination in employment" (29 U.S.C. § 621(b)). To effectuate these purposes, the ADEA contains a number of specific provisions expressly prohibiting age-based conduct by unions.*

See, e.g., *id.* at 88-89 n.20 ("we need not and do not decide the question whether employees have an implied right of action for back pay against their unions for violations of the Equal Pay Act"). As a party certainly possessing a personal stake in the outcome of this issue, TWA is entitled to present it to this Court. See, e.g., *Larson v. Valente*, 456 U.S. 228, 238-39 (1982), and cases cited therein.

- * For example, Section 4(c) of the ADEA provides that "[i]t shall be unlawful" for a labor organization "to discriminate against . . . any individual because of his age" or "to cause or attempt to cause an employer to discriminate against an individual in violation of this section." (29 U.S.C. § 623(c)). Labor organizations are further prohibited from retaliating against employees or applicants who exercise their ADEA rights (§ 4(d), 29 U.S.C. § 623(d)), and from making age-based distinctions in advertising or referrals for employment. Section 4(e), 29 U.S.C. § 623(e). In addition, labor organizations, like employers, are required to post conspicuously ADEA notices advising individuals of their rights. Section 8, 29 U.S.C. § 627.

The enforcement provision of the ADEA, § 7(b), 29 U.S.C. § 626(b), contains no language absolving labor organizations from monetary liability for this prohibited conduct. Rather, that section broadly provides *that a court* "shall have jurisdiction to grant *such legal* or equitable relief as may be appropriate to effectuate the purposes of *this Act*, including . . . enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation" Since the purposes of the statute include prohibitions on age-based actions by labor organizations, it is only logical that Congress intended Section 7(b) to include union monetary exposure in appropriate cases. As noted in *EEOC v. ALPA*, *supra*, 489 F. Supp at 1009: "It would not effectuate the purposes of the ADEA to allow unions to violate the Act without having to be concerned with being held liable for any resulting monetary damages."**

C. Holding Unions Liable for Back Pay Under the ADEA Would Be Consistent With Other National Labor Laws

Analogous support for holding unions liable can be drawn from case law under Title VII of the Civil Rights Act of 1964,

- * The reference in the statute to "unpaid minimum wages or unpaid overtime compensation" relates to language in the Fair Labor Standards Act ("FLSA") which has been specifically incorporated into Section 7(b) of the ADEA. It was this language which convinced the court in *Neuman*, *supra*, 28 FEP Cases at 1491, that monetary damages from a union were not available under the ADEA. However, such selectivity in the FLSA should not be applied woodenly to bar monetary recovery against a union when Section 7(b) expressly "grant[s] such legal or equitable relief as may be appropriate to effectuate the purposes of *this Act*," not the FLSA.
- ** See A-31 to A-33 for a discussion of what the majority viewed as the union's culpability here. In the face of such findings, the "Errata Sheet" may have removed monetary liability from ALPA, but it did not alter the majority's holding that "[w]hen a union becomes a party to a discriminatory provision in a collective bargaining agreement binding the employer to an unlawful practice, the union's conduct in aiding and abetting the employer to discriminate against the employee renders it independently liable for violation of the ADEA" (A-32).

42 U.S.C. § 2000e *et seq.*, under which unions as well as employers can be held liable for back pay awards.* These two statutes, sharing as they do "important similarities . . . in their aims . . . and in their substantive prohibitions," *Lorillard v. Pons, supra*, 434 U.S. at 584, "should be interpreted" here "*pari passu.*" *Northcross v. Memphis Board of Education*, 412 U.S. 427, 428 (1973).

In addition, a firm pronouncement by this Court holding unions liable for monetary relief under the ADEA would be consistent with other important national labor laws. It is well-established, for example, that under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, an employee who proves that the employer violated a labor agreement and that the union breached its duty of fair representation is entitled to recover damages from both the union and the employer "according to the damage caused by the fault of each." *Vaca v. Sipes, supra*, 386 U.S. at 197.** This is similarly true under the controlling labor relations statute for the airlines, the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"), where each party can be held to bear the damages attributable to its fault. See, e.g., *Czosek v. O'Mara*, 397 U.S. 25, 29 (1970) ("judgment against [the union] can . . . be had . . . for those damages that flowed from [its] own conduct"); *Electrical Workers v. Foust*, 442 U.S. 42, 50 n.13 (1979) (RLA case reaffirming the apportionment principle in *Vaca*, although a union cannot be liable for punitive damages).

* See, e.g., *Sears v. Atchison, Topeka & S.F. Ry.*, 645 F.2d 1365, 1374-77 (10th Cir. 1981), *cert. denied sub nom. UTU v. Sears*, 455 U.S. 964 (1982); *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1300 (8th Cir. 1978), *cert. denied*, ___ U.S. ___, 103 S. Ct. 97 (1982); *Russell v. American Tobacco Co.*, 528 F.2d 357, 366 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976).

** This principle was reaffirmed just last term in *Bowen v. United States Postal Service*, ___ U.S. ___, 103 S. Ct. 588 (1983), which held that where a union refuses to go to arbitration and is found to have breached its duty of fair representation, the union is liable for back pay damages that accrue after a hypothetical date on which an arbitrator would have issued an award.

Given the substantial role that unions play in many activities subject to challenge under the ADEA, no reason exists why the *Vaca* principle of apportionment should not obtain under the ADEA. Apart from the circumstances here, myriad situations exist wherein employers and unions are being jointly challenged under the ADEA. This is particularly true where the dispute centers on provisions in a collective bargaining agreement (by definition a joint employer/union endeavor). Without the spectre of monetary exposure, the "interest in deterring future [unlawful acts] by the union," *Bowen, supra*, 103 S. Ct. at 597 n.16, is meaningless.

III

THIS COURT SHOULD DECIDE WHETHER THE ADEA REQUIRES AN EMPLOYER TO ACCOMMODATE EMPLOYEES FOR AN AGE-RELATED REASON MERELY BECAUSE IT PROVIDES ACCOMMODATION FOR NON-AGE-RELATED REASONS

The Majority's Holding Presents Not Only an Important Question of Federal Law But Also One on Which the Courts of Appeals Have Rendered Conflicting Decisions

The majority's basis for liability against TWA is predicated upon a fundamental fallacy as to what the ADEA requires. This new ADEA standard is contrary to clear Congressional intent and in conflict with at least two other Circuit Courts of Appeals. If allowed to prevail, its ramifications for all employers are enormous.*

* Even if the decision did not affect all employers, it obviously affects the entire commercial airline industry.

At the present time, American Airlines has won at trial on its position that former Captains should not serve at all in the cockpit past age 60 as Flight Engineers. See *Johnson v. American Airlines, Inc.*, 18 Av. Cas. 17,177 (N.D. Tex. 1983), *appeal pending*, No. 83-1610 (5th Cir.). On the other hand, two airlines (Western and United Air Lines)

(Footnote continued on following page)

The majority holds that "because TWA routinely accommodates other employees . . . for *non-age* reasons," it must "accord the *same* treatment to age-60 captains and first officers . . ." (A-31). The majority is therefore apparently saying that every time an employer accommodates an employee for a non-age-related reason, it may now have to provide the same accommodation to someone claiming such entitlement simply because of age.

This is, as the dissent notes, "like comparing apples with oranges." (A-35 to A-36). Moreover, its impact on an employer's handling of its work force cannot be overemphasized. Does this mean that an employer providing a month's vacation to every employee of five year's service should now provide a month's vacation for all employees covered by the ADEA even if they do not have five years' service? Similarly, the dissent refers to a TWA Captain who breaks his leg (A-36). Does this mean that if a TWA Captain breaks his leg at age 50 (entitling him up to almost a year's sick pay at Captain rates while he recovers) (J.A. 288, 289; Secs. 15(A), (G)), then TWA should pay the same year's sick pay to a Captain who breaks his leg one day prior to age 60 even though the FAA regulation bars him from serving as a Captain past age 60?

The list is obviously endless. Now every time employers do something for a non-age reason, they must look over their shoulders to be certain they are not creating a situation where

have lost at trial on their position that no one should be allowed to serve in the cockpit beyond age 60. See *Criswell v. Western Air Lines, Inc.*, 514 F. Supp. 384 (C.D. Cal. 1981), *aff'd*, 709 F.2d 544 (9th Cir. 1983), *petition for rehearing pending*; *Monroe v. United Air Lines, Inc.*, 32 FEP Cases 1256, 1258-59 (N.D. Ill. 1982), *appeal pending*, Nos. 83-1245 *et al.* (7th Cir.). A third position has now been adopted by the majority below when it found liability for a group of age 60 pilots who had been unable or unwilling to transfer to Flight Engineer even though it is undisputed that 83% of those wishing to fly past age 60 were doing so (A-61 n.8). The confusion is obvious, and this Court should examine the industry-wide issue of whether, and under what circumstances, an airline must permit Flight Engineers to serve beyond age 60.

employees will come back and say they are entitled to the same thing because of age. The plaintiffs here were as much entitled as anyone else to the non-age accommodations to which the majority refers (A-10 to A-11). However, the mere existence of such non-age policies should not mean that just because of age the plaintiffs mandatorily acquire a *new* right.

Indeed, as noted by Judge Van Graafeiland in his dissent (A-36), the special creation of an age-related right is clearly contrary to Congressional intent. The House of Representatives Report accompanying the 1978 amendments specifically says that the ADEA amendments do "*not require* employers to provide *special working conditions* for older workers to allow them to remain or become employed." H.R. Rep. No. 95-527, 95th Cong., 1st Sess. 12 (1977).

Moreover, the holding below conflicts with decisions by both the Fifth and Eighth Circuits, the only other two Circuits which have commented on the question.* Recognizing the clear Congressional intent to treat everyone equally, the Fifth Circuit has specifically held that the age of an employee should be "accorded neutral status under the ADEA, neither facilitating nor hindering his employment, his chances for advancement, or his exposure to demotion or discharge." *Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982). The Eighth Circuit followed the same standard when it held in *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958, 960 (8th Cir. 1978), that the ADEA "does not require that advanced age and substantial length of service

* While the majority below believes otherwise (A-29), the holding is also in conflict with the Second Circuit's own decision in *Parcinski v. Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S. Ct. 725 (1983), which held that the "ADEA does not require an employer to accord special treatment to employees over forty years of age . . . It requires, instead, that an employee's age be treated in a neutral fashion, neither facilitating nor hindering advancement, demotion, or discharge." *Parcinski* was written by Judge Van Graafeiland, who dissented here on the grounds that the majority was "comparing apples with oranges." (A-35 to A-36).

entitle employees to special favorable consideration; it requires merely that an employee within the protected age group not be the subject of discrimination because of his or her age."

By having Captains bid for Flight Engineer in just the same manner as flight deck positions are normally filled under the collective bargaining agreement, TWA treated everyone *equally*—consistent with Congressional intent and with the prior holdings of the two other Circuits which have commented on the issue. It is undisputed that under TWA's policy, at least 83% of those Captains seeking to serve beyond age 60 have succeeded in that regard pursuant to the terms of a neutral bona fide seniority system (A-61 n.8).^{*} Yet that is not good enough for the plaintiffs and the majority below. What plaintiffs have been given by the majority is a virtual *guarantee* of a new position based on age simply because, in different circumstances, similar positions were provided to others for reasons unrelated to age. Indeed, the EEOC openly states that its claimants are entitled to "*affirmative action programs*" whereby they are "*automatically placed in a Flight Engineer position*" (J.A. 841-42).^{**}

^{*} When the plaintiffs were unable or unwilling to change their Captain status in accordance with the normal bidding procedures of the neutral seniority system, they were mandatorily retired at age 60 because they were in a position admittedly subject to the BFOQ exception to the ADEA (A-7 to A-8). Indeed, no one disputes that they could not serve as Captains beyond age 60. The district court properly held, therefore, that the plaintiffs "cannot establish a *prima facie* case of discrimination solely because no job vacancy existed at the time they applied and were eligible for the job. TWA was legally obligated to remove these pilots at age sixty under the FAA regulations. TWA was not obligated, however, to offer these ex-pilots jobs which did not exist. To the extent jobs existed, TWA was justified in relying upon a seniority bidding system." (A-57).

^{**} The majority below persists in claiming that what they are providing to the plaintiffs is "merely . . . the same treatment accorded all younger captains and first officers who become unable to serve in their former capacities for non-age reasons." (A-29 to A-30). But their reasoning inevitably creates a *new* right based on age. The plaintiffs not only get the same accommodations for non-age reasons as everyone else, but they now enjoy under the majority's decision these accommodations based on age.

In view of the ramifications of this decision for all employers, this Court should grant this petition to determine whether the majority of the panel has exceeded the intent of Congress by its ruling. A grant of the petition is equally appropriate because the majority's decision is contrary to what the Fifth and Eighth Circuits have said with respect to the ADEA not requiring special treatment for individuals covered by the statute.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the opinion and judgment of the Second Circuit.

Respectfully submitted,

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December 16, 1983

APPENDIX

A-1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1013, 1014, 1166—August Term, 1982

Argued: April 14, 1983

Decided: August 1, 1983

Docket Nos. 82-6266, 82-6306, 82-6280

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Plaintiff-Appellant,

—against—

TRANS WORLD AIRLINES, INC.,

Defendant-Appellee,

HAROLD H. THURSTON, et al. and

NICHOLAS VASILAROS, et al.,

Defendants-Intervenors Appellees.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK
and C. A. PARKHILL,

Plaintiffs-Appellants,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Intervenor Appellant,

—against—

5415

TRANS WORLD AIRLINES, INC. and AIR LINE PILOTS
ASSOCIATION, INTERNATIONAL,
Defendants-Appellees.

Before:

WATERMAN, MANSFIELD and VAN GRAAFEILAND,
Circuit Judges.

Judge Van Graafeiland concurs and dissents in a separate opinion.

Consolidated appeals from judgments of the Southern District of New York, Kevin T. Duffy, Judge, in two lawsuits growing out of TWA's action in response to Congress' 1978 amendment of the Age Discrimination in Employment Act, 29 U.S.C. §§621-634 (1976 and Supp. V 1981) ("ADEA"). TWA permits flight engineers to work until age 70 instead of being required to retire at 60 and allows captains and first officers, who must retire as such at 60 years, to downbid their status to that of flight engineer on certain conditions.

The district court granted TWA's motions for summary judgment dismissing (1) an action against it by the bargaining representative for flight deck crew members, Air Line Pilots Association ("ALPA"), claiming that age under 60 is a bona fide occupational qualification for flight engineer status and therefore exempt from the 1978 amendment, and (2) an action by certain captains and first officers (*Thurston*, et al.) claiming that TWA discriminated against them in violation of ADEA by re-

fusing to permit them to downbid to the position of flight engineer after they reached 60 years of age.

The judgment in the action by ALPA is affirmed.

The judgment in the *Thurston* action is reversed with directions to enter summary judgment in favor of the plaintiffs.

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MANSFIELD, *Circuit Judge*:

These consolidated appeals from judgments in two separate lawsuits against Trans World Airlines, Inc. ("TWA") in the Southern District of New York, Kevin T. Duffy, Judge, grow out of actions taken by TWA on August 10, 1978, permitting flight deck crew members in the status of "flight engineer" to work until the age of 70 instead of requiring them, as had been TWA's policy with respect to all such crew members (including captains and first officers), to retire at age 60. TWA made the change in response to Congress' amendment on April 6, 1978, of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621-634 (1976 and Supp. V 1981) to prohibit mandatory retirement prior to age 70.

In one action the Air Line Pilots Association ("ALPA"), bargaining representative of the flight deck crew members, challenged TWA's policy, seeking a declaratory judgment that age under 60 is a bona fide occupational qualification ("BFOQ") for flight engineers within the meaning of §623(f)(1) of the ADEA¹ and that

¹ Title 29 U.S.C. §623(f)(1) provides in pertinent part:

"It shall not be unlawful for an employer . . . (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of

TWA's action represented a unilateral change in working conditions in violation of the Railway Labor Act ("RLA"), 45 U.S.C. §156-188 (1976 & Supp. V 1981).² ALPA appeals from a summary judgment in favor of TWA. In a second action (*Thurston, et al. v. TWA and ALPA*) a group of crew members (captains and first officers) formerly employed by TWA, who had been unsuccessful in securing flight engineer status before their 60th birthdays, claim that TWA's policy, instigated and encouraged by ALPA, discriminates against them in violation of the ADEA by refusing to permit them to downbid to the position of flight engineer after they reached 60 years.³ The crew member-plaintiffs appeal from a summary judgment dismissing their action.⁴ We affirm the dismissal of ALPA's action and reverse the dismissal of the *Thurston* action.

The material facts are not in dispute.⁵ TWA, a commercial aircraft carrier, employs approximately 3,000 "pi-

this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. . . ."

² A group of former TWA captains, including Harold Thurston, a private plaintiff in the second action against TWA, and a group of permanent flight engineers (Vasilaros, et al.), were granted intervenor status to support TWA's policy.

³ The Equal Employment Opportunity Commission ("EEOC") was granted intervenor status as a plaintiff in this action, on behalf of other involuntarily retired captains and crew members who were or would be adversely affected by TWA's requirement that captains and first officers assume flight engineer status before their 60th birthday or be mandatorily retired.

⁴ The court's decision of September 13, 1982, 547 F. Supp. 1221, incorporated the reasoning of its prior decisions entered on November 17, 1980, 506 F. Supp. 234, and on January 26, 1981, 506 F. Supp. 236.

⁵ The parties did not enter into a stipulation of undisputed facts in the summary judgment proceedings below, but in their briefs and at oral argument the parties agreed that the case was in an appropriate posture for summary judgment as to liability.

lots”⁶ on its wide-bodied planes in three (and sometimes four) cockpit positions. The “captain” commands the aircraft and is responsible for all phases of its operation. The “first officer” assists or relieves the captain as co-pilot. The “flight engineer” sits at a side-facing instrument panel and is primarily responsible for pre-flight inspection and in-flight monitoring of the mechanical, electrical, and electronic functioning of the aircraft.

A flight engineer does not operate the flight controls. Unlike the captain and first officer, who are required by the Federal Aviation Administration (“FAA”) to have first class medical certification, the flight engineer needs only a second class medical certificate. The flight engineer does have crucial duties in emergencies, such as an all-engine flame-out but, should the flight engineer become incapacitated, the “fail-safe” principle of crew redundancy means that the first officer would perform the engineer’s duties until the aircraft is brought to an emergency landing. In the event of incapacitation of the captain or first officer, the flight engineer may perform first officer duties except for take-off and landing. On certain long-distance flights there is a fourth crew member, an “International Relief Officer” (“IRO”), who acts as third in command and who performs, *inter alia*, first officer duties (excluding take-off and landing) and flight engineer duties.

⁶ Although most people probably think of the term “pilot” as limited to officers who handle the flight controls of a plane, the Working Agreement between ALPA and TWA defines all TWA flight deck crew members, including flight engineers, as “pilots” and requires that all TWA “pilots” possess a currently effective commercial pilot’s certificate and other pilot qualifications. The FAA does not require flight engineers to possess pilot qualification. Certain “career” flight engineers, such as the defendant-intervenor-appellee in *ALPA v. TWA*, Nicholas Vasilaros, who were on the seniority list in 1962, are permitted by agreement to continue as flight engineers without pilot certification.

Under an FAA regulation, 14 C.F.R. §121.383(c) (1982), persons are prohibited from serving as “pilots” on a commercial aircraft carrier beyond age 60 (“Age 60 Rule”). Captains, first officers, and IRO’s are considered “pilots” for purposes of the Age 60 Rule. The Age 60 Rule, however, does not apply to the third seat position of flight engineer.

The ADEA as amended prohibits an employer from discriminating against an employee between the ages of 40 and 70 “with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age . . .” and from limiting, segregating, or classifying its employees “in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age.” 29 U.S.C. §§623(a)(1), (a)(2). The Act further forbids the involuntary retirement of an employee within the protected age group “because of the age of such individual.” *Id.* §623(f)(2). It is also unlawful under the ADEA for a labor organization “to cause or attempt to cause an employer to discriminate against an individual in violation of [the Act] . . .” *Id.* §623(c)(3).

The ADEA, however, permits an employer or labor organization to take actions otherwise prohibited under the Act “where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age,” *id.* §623(f)(1), or “to observe the terms of a bona fide seniority system . . . which is not a subterfuge to evade the purposes of [the Act] . . .” *Id.* §623(f)(2).

The parties agree for purposes of this litigation that the FAA Age 60 Rule may establish a “bona fide occupa-

tional qualification" ("BFOQ") for captains and first officers within the meaning of 29 U.S.C. §623(f)(1) of the ADEA. Cf. e.g., *Starr v. FAA*, 589 F.2d 307, 313 (7th Cir. 1978); *Rombough v. FAA*, 594 F.2d 893, 899 (2d Cir. 1979) (upholding FAA's denial of exemption from Age 60 Rule as within agency's discretion); but cf. *Tuohy v. Ford Motor Co.*, 675 F.2d 842, 846 (6th Cir. 1982).⁷

The "Retirement Plan for Pilots of Trans World Airlines, Inc.," ("Retirement Plan") negotiated as part of the 1977 Working Agreement between TWA and ALPA and incorporated in it by reference, provided that the "normal retirement date is the [pilot's]⁸ 60th birthday" and that "[pilots] must retire by their normal retirement date unless written approval of the company is granted for continuance in employment." Articles 4.1, 4.2. Article 4.3 of the agreement provides for the disbursement of retirement benefits in the event of employment past age 60. The agreement was re-negotiated in 1979 (with a non-re-negotiation provision stating that the agreement could not be reopened until September 30, 1981) and again in April 1982. The retirement provisions remained unchanged. They had governed the relationship for many years prior to these agreements, and, historically, TWA had employed no flight crew member over the age of 60 on its airplanes until 1978.

Following Congress' April 6, 1978, amendment of the ADEA to prohibit, *inter alia*, the involuntary retirement of persons before the age of 70 solely on the basis of age even if in accordance with a bona fide seniority plan, 29

⁷ ALPA originally opposed the FAA's Age 60 Rule as arbitrary and discriminatory. See *Air Line Pilots Association, International v. Quesada*, 276 F.2d 892 (2d Cir. 1960).

⁸ See note 6, *supra*.

U.S.C. §623(f)(2), TWA failed to agree with ALPA on a revision of TWA's retirement program so that it would comply with the 1978 amendments. On August 10, 1978, TWA unilaterally issued a bulletin authorizing the continued or reactivated employment of "any cockpit crew member who is in a flight engineer status at age 60," retroactive to April 6, 1978. The term "flight engineer status" was not defined and the procedure whereby captains and first officers approaching 60 might acquire that status was not described. The bulletin simply provided that those flight deck officers who wanted to work past 60 would "be governed by the provisions of the current Working Agreement" and the FAA's Age 60 Rule for captains and first officers.

To implement its new policy TWA immediately reinstated those who had been in flight engineer status on their 60th birthdays and had been retired after April 6, 1978. Flight engineers reaching their 60th birthday after August 10, 1978 continued in that status. However, captains and first officers who might seek to downbid themselves to the position of flight engineer and then work as such beyond age 60 were required to change their status to flight engineer in accordance with the seniority and bidding procedures of the Working Agreement.

Under those procedures a captain or first officer approaching 60 years of age was required successfully to complete his downbid with an effective date as a flight engineer before he reached 60 years or else face mandatory retirement and removal of his name from the seniority list upon his reaching 60 years. Since the downbidding captain or first officer first had to pass the FAA written examination for flight engineer and then wait until a flight engineer vacancy opened up before his bid would

become effective,⁹ the procedure forced captains and first officers desiring to continue as flight engineers after 60 to downbid well before they reached 60 or lose out altogether.

Most of the 70 captains and first officers who have downbid for flight engineer positions successfully obtained that status before reaching 60. However, several, including plaintiff-appellant Harold Thurston, turned 60 between April 6 and September 1, 1978, when there were no flight engineer vacancies. Hence they could not secure a flight engineer bid before their 60th birthdays. Accordingly, they were mandatorily retired and their names were removed from the seniority list.¹⁰

Under TWA's 1977 Working Agreement with ALPA, captains or first officers who downbid to the position of flight engineer for reasons other than age were not similarly stripped of their seniority or severed from TWA. For example, those who are unable to maintain a first class medical certificate but are still medically qualified to become flight engineers may automatically displace or "bump" a less senior flight engineer without being required to bid for the downgraded position. If the captain or first officer lacks sufficient seniority to displace, he is not discharged; rather, he is entitled to go on unpaid medical leave for up to five years.

⁹ Since 1980 TWA further requires that "whenever possible" downbidding captains be trained as flight engineers prior to the effective date of their flight engineer bids.

¹⁰ In addition to Harold Thurston, there were in the court below two other named plaintiffs, Clifton A. Parkhill and Christopher J. Clark, and 10 EEOC claimants. Three of the EEOC claimants have since settled. The remaining EEOC claimants are: A.M. Lusk, L.D. Bobzin, Robert Gowling, T.H. Widmayer, Alfred T. Humbles, Donald V. Roquemore, and Horace W. Lewis.

Similarly, the Working Agreement provides that a pilot whose position is eliminated at a domicile due to reductions in force may use his seniority to displace a less senior pilot in any status at his current or last former domicile, or in his current status anywhere in TWA's system. Like his medically disabled counterpart, the jobless pilot who lacks sufficient seniority to displace is not discharged. Rather, he is placed on furlough status which may extend for up to 10 years during which time he continues to accrue seniority for purposes of a recall.

In addition, TWA, as a disciplinary measure in response to demonstrated incompetence, has not discharged incompetent pilots but has permanently transferred them to lower positions (such as that of flight engineer) for which they are qualified, without requiring the pilot to bid for a vacancy. This practice apparently routinely occurs without contractual provision.

Following TWA's August 10, 1978, bulletin, ALPA prevailed upon TWA to impose additional restrictions on downbidding captains and first officers approaching age 60, which were designed to make it more difficult for downbidders approaching 60 to acquire status as flight engineers. The first restriction put forth by ALPA and adopted by TWA in January 1980 requires successful captain downbidders to "fulfill their bids in a timely manner." Prior to this rule downbidding captains who had successfully bid for positions as flight engineers were permitted to function as captains until age 60 and then begin training as flight engineers. Under the new rule the downbidding captains are required to complete their training and assume their positions as flight engineers before reaching 60, thereby losing the difference in pay and responsibility they would have enjoyed if they had been allowed to complete their careers as captains up to

60 years of age. This rule resulted in the cancellation of bids awarded three downbidding EEOC plaintiffs and in their involuntary retirement.

The second restriction, also imposed in January 1980, relates to the time by which the downbidder must complete his written examination for the position of flight engineer. Previously the downbidder was placed at age 60 on an off-duty-without-pay status until he had passed the examination. Under the new rule the captain's downbid is cancelled unless he has passed the examination when reporting for training. This rule, operating with the "effective date" requirement, forced the retirement of two EEOC plaintiffs.

The district court ruled that TWA's elimination of its age 60 retirement policy for flight engineers was not a "major" dispute under the RLA and that age 60 for flight engineers was not a BFOQ within the meaning of the ADEA precluding TWA from continuing those over 60 in that status. The court accordingly awarded summary judgment to TWA in the *ALPA* action. 547 F. Supp. at 1226-28; 506 F. Supp. at 238; 506 F. Supp. at 234-36.

With respect to the *Thurston, et al.* and *EEOC* claim the district court determined that TWA was also entitled to summary judgment, concluding that since none of the *Thurston* plaintiffs or EEOC claimants could show that a flight engineer vacancy existed at the time he applied and was eligible for the job "TWA was legally obligated to remove these pilots at age sixty under the FAA regulations. . . . TWA was not obligated, however, to offer these ex-pilots jobs which did not exist. To the extent jobs existed, TWA was justified in relying upon a seniority bidding system." 547 F. Supp. at 1229.

DISCUSSION

The parties agree that on these appeals there are no material issues of fact relating to liability and that the disputed liability issues may appropriately be disposed of by summary judgment. See *Zweig v. Hearst Corp.*, 521 F.2d 1129, 1136 (9th Cir.), *cert. denied*, 423 U.S. 1025 (1975); *Fitzgerald v. Westland Marine Corp.*, 369 F.2d 499, 500 (2d Cir. 1966).

A. *ALPA v. TWA*

1. *The "Major-Minor" Dispute Issue*

The first issue raised by ALPA is whether TWA's unilateral elimination of the mandatory age 60 retirement for flight engineers constitutes a "major" change in existing terms and conditions of employment in violation of the union's bargaining rights under §6 of the Railway Labor Act, 45 U.S.C. §156, which would be remediable by a federal court, or whether the change involves a "minor" dispute arising out of the application and interpretation of the existing agreement, which would be subject to binding adjudication by the appropriate Adjustment Board.

To resolve the "major"- "minor" dispute controversy we look first

"to the collective bargaining agreement to determine whether a plausible interpretation would justify the carrier's action. A dispute is major if the carrier's contractual justification for its actions is 'obviously insubstantial.' On the other hand, a dispute is minor if the contract is 'reasonably susceptible' to the carrier's interpretation." *Local 553, Transport*

Workers Union v. Eastern Air Lines, Inc., 695 F.2d 668, 673 (2d Cir. 1982) (citations omitted).

When it is difficult to determine whether the agreement between the parties "arguably supports" the carrier's actions, we look, in close cases, at the pragmatic effects of the carrier's action on working conditions to see whether the magnitude of the disruption caused by the carrier is "major" in a literal sense. *Id.* at 674. But when there is a "clearly governing provision in the present agreements," our inquiry need not range beyond the interpretation of the language of the agreement. *Rutland Railway Corp. v. Brotherhood of Locomotive Engineers*, 307 F.2d 21, 34 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963).

Applying these standards, TWA's post-1978 retirement policy clearly does not give rise to a major dispute; at most there exists a minor dispute over the carrier's interpretation or application of the parties' 1977 Working Agreement. That agreement expressly allowed TWA to retain employees after age 60 by written waiver of the age limit, Retirement Plan, Article 4.2, and provided in Article 4.3 for the disbursement of retirement benefits in the event of employment past age 60. In view of this "clearly governing provision" in the agreement, *Rutland Railway, supra*, TWA's justification for its action is not "obviously insubstantial." *Local 553, supra*, 695 F.2d at 673. See also *Cafferty v. Trans World Airlines, Inc.*, 488 F. Supp. 1076, 1078 & n.3 (W.D. Mo. 1980) (stating with respect to the same Working Agreement that "the [waiver] provision [arguably] constitutes a standing consent by ALPA to the action taken by TWA in 1978").

ALPA argues that despite the provisions of the Agreement, no TWA flight engineer ever served past age 60 in

the period between the adoption of the initial retirement plan in 1950 and the August 1978 change in policy. This longstanding practice, ALPA submits, established a clear understanding between the parties that the agreement required retirement at age 60. See *Brotherhood of Locomotive Firemen and Enginemen v. Southern Railway Co.*, 217 F. Supp. 58, 62 (D.D.C. 1963), *aff'd*, 337 F.2d 127 (D.C. Cir. 1964). We disagree.

Whatever the significance of TWA's practice of not invoking its discretionary power under the Agreement to waive the age 60 retirement policy, ALPA may not now seek to compel negotiations over that policy when, as Judge Duffy found, "(i) it had ample opportunity to do so when the 1979 Working Agreement was negotiated; and (ii) when the 1979 Working Agreement states that the entire Agreement shall remain in full force and effect through September 30, 1981 and may not be reopened under Section 6 of the RLA any sooner than 120 days prior to September 30, 1981 unless the parties mutually agree otherwise." 506 F. Supp. at 238. We have deemed such non-renegotiation provisions an essential "instrument for achieving industrial peace," *Seaboard World Airlines, Inc. v. TWU*, 443 F.2d 437, 439 (2d Cir. 1971), and we will not turn them aside when the parties to the signing of the agreement were fully aware of the contested issue. Cf. *Flight Engineers' International Association v. American Airlines, Inc.*, 303 F.2d 5, 13 (5th Cir. 1962). Furthermore, since Judge Duffy's 1981 decision, ALPA signed another Working Agreement with TWA in April 1982 and again failed to negotiate over TWA's retirement policy for flight engineers. 547 F. Supp. at 1224 n.2. If nothing else, ALPA has now waived any right it might have had to compel negotiation on a subject over which it decided not to negotiate on two occasions. Accordingly,

we affirm the district court's grant of summary judgment in favor of TWA dismissing ALPA's claim that the elimination of the age 60 retirement policy for flight engineers constitutes a "major" dispute.

2. The "Bona Fide Occupational Qualification" ("BFOQ") Issue

ALPA next seeks a declaratory judgment that the 1978 amendments to the ADEA did not require retention of flight engineers past age 60 because that age is a "bona fide occupational qualification" for flight engineers within the meaning of 29 U.S.C. §623(f)(1). At the outset we are met with a challenge to the district court's jurisdiction to adjudicate the merits of ALPA's claim, for it is unquestioned that the Declaratory Judgment Act, 28 U.S.C. §§2201-02, which provides that in "a case of actual controversy within its jurisdiction," a federal court "may declare the rights and other legal relations of any interested party," does not itself create any federal jurisdiction. The Declaratory Judgment Act provides an additional remedy in cases resting on some independent basis of federal jurisdiction. *Miller-Wohl Co. v. Commissioner of Labor and Industry, State of Montana*, 685 F.2d 1088, 1090 (9th Cir. 1982).

ALPA's pleadings assert jurisdiction under 28 U.S.C. §§1331 and 1336 and base its claim to federal question jurisdiction alternatively on two federal statutes: the RLA or the ADEA. Our determination that TWA's unilateral change in its retirement policy appears to be permitted by the Working Agreement, thereby constituting at most a minor dispute, necessarily disposes of the claim to jurisdiction under the RLA. A minor dispute is subject to binding adjudication by the appropriate Adjustment Board, which has exclusive jurisdiction to resolve ques-

tions of contract interpretation. "[C]ourts may not adjudicate the merits of these [minor] issues." *Local 553, supra*, 695 F.2d at 674-75; 45 U.S.C. §153, First. Consequently, we will not enjoin a carrier from actions that have given rise to a minor dispute when the RLA "calls for the Adjustment Board to determine whether the carrier's action was permissible under the governing contract." *Id.* (citing *United Transportation Union v. Penn Central Transportation Co.*, 505 F.2d 542, 545 (3d Cir. 1974) (per curiam)).

Our intervention in the merits of this minor dispute would defeat the Adjustment Board's jurisdiction, a result directly contrary to the dispute resolution mechanism of the RLA. Although courts may take action to preserve a minor dispute for the Adjustment Board when the carrier's actions threaten irreparable injury to the union which would render a subsequent decision by the Board in the union's favor "an empty victory," *Local 553, supra*, 695 F.2d at 675 (quoting *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad Co.*, 363 U.S. 528, 534 (1960)), the evidence is overwhelming that an Age 60 Rule for flight engineers is not reasonably necessary to insure safety standards and that ALPA's claim to the contrary must be rejected.¹¹ As of February

¹¹ Although ALPA argues that this dispute threatens the safety of its members, it admits that its action is motivated by economic, not just safety, concerns: "The continuation in employment of flight engineers over age 60 has necessarily deprived substantial numbers of furloughed pilots of work opportunities. Between August, 1979 and June, 1980 TWA laid-off approximately 375 pilots. . . . As of February, 1982, TWA employed approximately 130 flight engineers over age 60. . . . All incumbent flight engineers with lesser seniority than this group have suffered a loss of the opportunity to obtain higher paying flight engineer assignments, and to obtain assignments with preferred working conditions." Brief for Plaintiff-Appellant ALPA pp. 10-11. Economic considerations, however, cannot be the basis for a BFOQ, when "precisely those considerations were among the targets of the

1982, TWA employed approximately 130 flight engineers over age 60. ALPA has pointed to no evidence indicating that any airline accident has ever been caused by the incapacitation of a flight engineer, much less an over-60 flight engineer. The first officer, and sometimes an additional International Relief Officer, is always there to take over the flight controls should the captain become incapacitated.

The FAA, the paramount agency charged with airline safety, has not imposed its Age 60 Rule on flight engineers. Indeed, the agency has announced an intention to reconsider its Age 60 Rule for captains and first officers, and, as one district court has noted, the FAA does not even apply its Age 60 Rule to its own pilots who fly the agency's fleet, which includes aircraft as large as Boeing 707s. *Criswell v. Western Air Lines, Inc.*, 514 F. Supp. 384, 390 n.9 (C.D. Cal. 1981), *aff'd*, ___ F.2d ___ (9th Cir. June 28, 1983). Nor has TWA, which operates under a congressional mandate to maintain "the highest possible degree of safety," 49 U.S.C. §1421(b), perceived any danger in employing flight engineers over age 60.

Furthermore, courts that have considered this issue have uniformly agreed that Age 60 for flight engineers is not reasonably necessary to airline safety. See, e.g., *Criswell v. Western Air Lines, Inc.*, *supra*, 514 F. Supp. at 389-90, *aff'd*, ___ F.2d ___ (9th Cir. June 28, 1983); *Monroe v. United Air Lines, Inc.*, 31 E.P.D. ¶ 33,330 (N.D. Ill. 1983). That ALPA was a third-party defendant in the *Monroe* action, with a full and fair opportunity to litigate the BFOQ issue, might by itself provide grounds for dismissal of this meritless claim on well-established principles of collateral estoppel. See, e.g., *Montana v.*

Act." *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982).

United States, 440 U.S. 147, 153 (1979); *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979). In the absence of any showing that Age 60 is a BFOQ and thus that TWA's action threatens the union with irreparable injury, we hold that jurisdiction is lacking under the RLA to adjudicate the merits of ALPA's BFOQ claim.

The union argues in the alternative that we have jurisdiction to entertain the issue under the ADEA. ALPA reasons that because the ADEA makes it unlawful for a labor organization "to cause or attempt to cause an employer to discriminate against an individual in violation of this section," 29 U.S.C. §623(c)(3), and because the ADEA contemplates the routine assertion by unions of the defense that employment practices are not unlawful by reason of a BFOQ, §623(f)(1), even in circumstances where the employer has refused to comply with union requests to implement the qualification policy, the Act must also permit the *creation* of a BFOQ defense that may be adjudicated affirmatively by means of an action for a declaratory judgment. We disagree.

Even if a labor organization could assert a BFOQ defense in opposition to the employer's position (a dubious proposition for it is the employer, not the union, who sets occupational qualifications), the ADEA does not provide employers or labor unions with a cause of action to preempt the rights of employees by filing an anticipatory declaratory judgment action to establish a statutory defense. The ADEA protects the rights of "persons[s] aggrieved"—individual employees and applicants for employment—between 40 and 70 years of age. 29 U.S.C. §§623(a)-(e), 626(c)(1), 631. A union may have standing under the ADEA to vindicate the rights of its members that the ADEA is designed to protect. See *Warth v. Seldin*, 422 U.S. 490, 500 & n.12, 511 (1975); cf. *Interna-*

tional Woodworkers of America v. Georgia-Pacific, 568 F.2d 64, 66-67 (8th Cir. 1977) (union has associational standing to file suit under Title VII to end discrimination); *EEOC v. Emerson Electric Co.*, 539 F. Supp. 153, 155 (E.D. Mo. 1982) (same). Here, however, ALPA is not suing "to promote employment of older persons," which is the purpose of the Act, 29 U.S.C. §621(b). On the contrary, it seeks to use the ADEA to cut off the rights of the older flight engineers. This ALPA may not do. The basic objective of the ADEA is to outlaw unjustifiable discrimination based on age. It follows that no cause of action to force an employer to discriminate through the establishment of an age-related BFOQ can "arise under" the ADEA. Cf. *Chrysler Corp. v. Brown*, 441 U.S. 281, 290-94 (1979) (Chrysler cannot sue under FOIA, a disclosure statute, to force nondisclosure); *Von Aulock v. Smith*, 548 F. Supp. 196, 197 (D.D.C. 1982) (employees lack standing to seek declaration that employer's affirmative defense under the ADEA may be invalid); *Wohl Shoe Company v. Wirtz*, 246 F. Supp. 821, 822 (E.D. Mo. 1965); see also *St. Louis, Missouri, Paper Carriers Union No. 450 v. Pulitzer Publishing Co.*, 309 F.2d 716, 718 (8th Cir. 1962).

Aside from the fact that the purpose of the ADEA would be frustrated by ALPA's declaratory action, the action would also by-pass the statutory procedure provided for by the ADEA, which is based on the prior filing of a charge of unlawful discrimination with the EEOC beginning a process of "conciliation, conference, and persuasion." 29 U.S.C. §626(d).¹² See also 29 U.S.C.

¹² Timely filing of a charge with the EEOC is a jurisdictional prerequisite to the maintenance of a Title VII action. *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 555 n.4 (1977); *De Figueiredo v. TWA*, 527 F. Supp. 933, 934-35 (S.D.N.Y. 1981).

§633(b). A potential ADEA defendant cannot be permitted to invoke the declaratory judgment procedure "to pre-empt and prejudice issues that are committed for initial decision to an administrative body." *Utah PSC v. Wycoff Company, Inc.*, 344 U.S. 237, 241, 246 (1952); cf. *Katzenbach v. McClung*, 379 U.S. 284, 296 (1964).

The BFOQ is an extremely narrow exception to the general prohibition against age discrimination. *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743, 748 (7th Cir. 1983); 29 C.F.R. §860.102(b) (1982); cf. *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977) (sex based discrimination). The defense must relate to the actual ability of the employee to perform his or her assigned job. *Smallwood v. United Air Lines Inc.*, 661 F.2d 303, 307 (4th Cir. 1981); *cert. denied*, 456 U.S. 1007 (1982); *Gathercole v. Global Associates*, 545 F. Supp. 1280, 1282 (N.D. Cal. 1982). The BFOQ, therefore, cannot be established without proof relating to the inability of medical science to "predict, on an individual basis, the likelihood that a pilot who has reached age 60 will become incapacitated during flight." *Tuohy v. Ford Motor Co.*, 675 F.2d 842, 846 (6th Cir. 1982). We will not strain to expand our discretionary jurisdiction to issue a declaratory judgment in aid of this narrow BFOQ defense, particularly absent any showing of legitimate safety concerns.

In sum, the purpose and structure of the ADEA do not permit us to provide an avenue for implementing ALPA's attempt to use the Act to cut off the rights of its older members. Accordingly, we hold that we lack jurisdiction under either the RLA or the ADEA to entertain ALPA's declaratory judgment action. Dismissal of it must therefore be affirmed.

B. *THURSTON AND EEOC v. TWA AND ALPA*

Those appellants who were prevented by the Age 60 Rule from downbidding from captain to flight engineer contend that the district court erred by adhering woodenly to the formula prescribed by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for establishing a prima facie case of discriminatory treatment and by failing to consider their direct evidence of an age-based differentiation in the treatment of downbidding captains and first officers. Appellants also argue that the district court erred in holding that they could not establish a violation of the ADEA under a disparate impact theory. Finally, they maintain that the court further erred in holding that TWA's actions fell within the exceptions provided by 29 U.S.C. §623(f) of the Act. Consideration of these claims requires a brief discussion of the governing legal principles of discrimination law.

A plaintiff has the initial burden of offering adequate evidence to raise an inference that an employment decision was based on discriminatory criteria illegal under the Act. Once this burden is discharged the plaintiff has made out a prima facie case. Then the defendant must come forward and articulate some legitimate, nondiscriminatory reason for the employer's actions. The plaintiff thereafter must, in order to prevail, prove that the defendant's proffered reason is merely a pretext for discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 (1977); *Pena v. Brattleboro Retreat*, No. 82-7598, slip op. at 2131 (2d Cir. March 1, 1983); *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914, 919 (2d Cir. 1981).

Discriminatory or disparate treatment in violation of the ADEA occurs when an employer treats some people

less favorably than others because of age. While proof of a discriminatory motive is critical, "it can in some situations be inferred from the mere fact of differences in treatment." *Geller v. Markham*, 635 F.2d 1027, 1031 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981). A prima facie case of discriminatory treatment under the ADEA (as under Title VII) may ordinarily be made out by meeting the four requirements set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *Geller v. Markham*, supra, 635 F.2d at 1032; *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007, 1014 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981). These requirements establish that the plaintiff has not suffered an adverse employment decision for either of the two most common legitimate reasons: lack of qualifications or the absence of a vacancy in the position sought. *Texas Department of Community Affairs v. Burdine*, supra, 450 U.S. at 253-54; *International Brotherhood of Teamsters v. United States*, supra, 431 U.S. at 358 n.44; *Stanojev v. Ebasco Services*, supra, 643 F.2d at 919-20. Applying the *McDonnell Douglas* formula here, it is clear, as the district court held, that appellants could not establish that there were flight engineer vacancies at the time they applied to transfer.

The *McDonnell Douglas* formula, however, is "not necessarily applicable in every respect to differing factual situations," *McDonnell Douglas Corp. v. Green*, supra, 411 U.S. at 803 n.13. Nor is it "an inflexible rule," *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 575 (1978); accord *Texas Department of Community Affairs v. Burdine*, supra, 450 U.S. at 253-54 n.6; *International Brotherhood of Teamsters v. United States*, supra, 431 U.S. at 358. We stated in a Title VII context:

"The four *McDonnell Douglas* requirements . . . do not represent the exclusive method of showing dis-

parate treatment under Title VII. . . . [A] court need not adhere stubbornly to that case's specific formulae when common sense dictates the same result on the basis of alternative formulae." *Grant v. Bethlehem Steel Corp.*, *supra*, 635 F.2d at 1014.

See also, *Garner v. Boorstin*, 690 F.2d 1034, 1036 n.4 (D.C. Cir. 1982); *Stanojev v. Ebasco Services, Inc.*, *supra*, 643 F.2d at 920-21. A plaintiff is not barred by the *McDonnell Douglas* method from making out a prima facie case of age discrimination by alternative means, such as *direct* proof that an employer discriminates on the basis of age. *Stanojev*, *supra*, 643 F.2d at 921; see also *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 & n.18 (1st Cir. 1979).

Plaintiffs in the present case took advantage of this alternative method of making out a prima facie case. Their evidence revealed that TWA grants the downgrading requests of all pilots with sufficient seniority except those of captains and first officers who reach age 60. This direct evidence of a differentiation based solely on age is sufficient to give rise to an inference of discriminatory motive, see *Geller v. Markham*, *supra*, 635 F.2d at 1031, and establishes, therefore, a prima facie case of discriminatory treatment. See *Stanojev*, *supra*, 643 F.2d at 921; *Stone v. Western Air Lines, Inc.*, 544 F. Supp. 33, 37 (C.D. Cal. 1982).¹³

TWA argues in reply that even under this alternative formula for raising an inference of discriminatory treatment appellants failed to make out a prima facie case,

¹³ In light of our holding that the appellants have made out a prima facie case of discriminatory treatment under the ADEA, it is unnecessary for us to consider whether appellants could establish their discrimination claim under an alternative theory of discriminatory impact.

since most captains and first officers seeking to downbid to flight engineer positions have been successful, which negates the "critical" element of discriminatory motive. We disagree. That some captains were successful in complying with the company's discriminatory transfer policy—and then at the price of an early demotion—cannot excuse the denial of equal opportunity to other members of the protected class. Cf. *Furnco Construction Corp. v. Waters*, *supra*, 438 U.S. at 579. As the Supreme Court recently stated in *Connecticut v. Teal*, 102 S. Ct. 2525 (1982),

"It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group." *Id.* at 2535.

Likewise, Congress never intended favorable treatment of some members of a plaintiffs' age group to excuse discrimination against others. The ADEA, like Title VII, "does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her [protected class] . . . were hired. . . . Every *individual* employee is protected against . . . discriminatory treatment. . . ." *Id.* (emphasis in original).¹⁴

TWA and ALPA rely principally on two statutory defenses to rebut appellants' prima facie case. First, TWA asserts that its contested practices are part of a bona fide seniority system and thus liability is foreclosed under 29 U.S.C. §623(f)(2). Appellants, however, do not challenge

¹⁴ " '[T]he [substantive] prohibitions of the ADEA were derived *in haec verba* from Title VII,' " *Geller v. Markham*, *supra*, 635 F.2d at 1032 (quoting *Lorillard v. Pons*, 434 U.S. 575, 584 (1978)).

the operation of the seniority system, but their summary exclusion from it at age 60. The employment practice at issue in this lawsuit—the severing of age 60 captains from the company—is in no way mandated by the negotiated seniority system. That system provides only that seniority rights shall be forfeited upon severance from the company, but it does not, and lawfully cannot, specify that pilots who attain age 60 shall be severed. See *id.* §623(f)(2) (no bona fide seniority system “shall require or permit the involuntary retirement of any individual . . . [protected under the Act] because of the age of such individual”). TWA’s practice, “which equates involuntary retirement as a captain at age 60 with a complete severance from the company,” *Stone v. Western, supra*, 544 F. Supp. at 37, is not part of a bona fide seniority system. The bona fide seniority defense is therefore unavailable to TWA as a matter of law. See *Johnson v. American Airlines, Inc.*, Nos. CA-3-80-434-D and CA-3-81-1020-D (N.D. Tex. filed Feb. 22, 1983).¹⁵

Second, ALPA argues that since age under 60 is a lawful BFOQ for captains to continue as such, they may be precluded from downbidding after 60 to positions for which age 60 is *not* a BFOQ, i.e., flight engineers, by §623(f)(1), which provides that “[i]t shall not be unlawful . . . to take any action otherwise prohibited under [the Act] . . . where age is a bona fide occupational qualification” In support of this position ALPA relies on an expansive reading of the phrase “take any action otherwise prohibited” which it contends is justified by the

¹⁵ Since we conclude that TWA’s compliance with a bona fide seniority system cannot establish a justification under §623(f)(2) for the extinguishment of appellants’ seniority at age 60, *a fortiori* the seniority system cannot establish a defense under the exception contained in §623(f)(1) for a “reasonable factor other than age.”

contrasting language of another section of the statute, §623(f)(2) and by the legislative history of the statute. We cannot agree.

It is true that §623(f)(2),¹⁶ unlike §623(f)(1), contains an explicit prohibition against involuntary retirement on the basis of age, and that in withdrawing a proposed amendment to §623(f)(1) that would have expressly allowed mandatory retirement, the Conference Committee report stated that “[t]he conferees agree that the amendment neither added to nor worked any change upon present law.” H. Conf. Rep. No. 95-950, 95th Cong., 2d Sess., 7, *reprinted in* 1978 U.S. Code Cong. & Ad. News 528-29. The House Report on the ADEA also provides:

“This legislation does not require employers to provide *special working conditions* for older workers to allow them to remain or become employed. While special jobs, part-time employment, retraining and transfers to less physically demanding jobs may be of great benefit to the older employees and the employer alike, these activities are not required by this legislation.” H.R. Rep. No. 527, 95th Cong. 1st Sess. 12. (Emphasis supplied).

From this ALPA reasons that Congress was aware that when an employee ceases because of a BFOQ requirement to qualify for one type of job (captain or first officer in the present case) the employer may sever his employment completely while permitting others who are likewise un-

¹⁶ Section 623(f)(2) provides in pertinent part:

“It shall not be unlawful for an employer . . .

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual”

qualified for different reasons to continue their employment in a downgraded capacity.

ALPA's argument is unpersuasive. The terms of §623(f)(1) plainly reveal its purpose, which is to excuse only those age-based actions against employees that are related to the "particular job" (in this case captain or first officer). The Senate Report makes this clear. S. Rep. No. 493, 95th Cong., 2d Sess., 10-11, *reprinted in* 1978 U.S. Code Cong. & Ad. News 513-14. See also H.R. Rep. No. 527, *supra*, at 12.

That age less than 60 is a BFOQ for the particular job of captain or first officer provides no license for TWA to discriminate against those over 60 who wish to transfer to positions as flight engineers, for which age 60 is *not* a BFOQ, by permitting other captains and first officers to do so. To hold otherwise would frustrate the purpose of the ADEA, which is "to promote employment of older persons" and "to prohibit arbitrary age discrimination in employment," 29 U.S.C. §621(b), and the purpose of the 1978 amendments, which is "to protect older workers from involuntary retirement, . . . to insure that older individuals who desire to work will not be denied employment opportunities solely on the basis of age." S. Rep. No. 493, *supra*, at 1, *reprinted in* 1978 U.S. Code Cong. & Ad. News 504; see also H.R. Rep. No. 527, *supra*, at 1, 2.

Because the BFOQ provision creates an exception to the statute's general prohibition against discrimination based on age, it must be narrowly construed and may be invoked only if an employer proves "plainly and unmistakably" that its employment practice meets the "terms and spirit" of the remedial legislation. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (construing the Fair Labor Standards Act); *Orzel v. City of Wauwatosa*, 697

F.2d 743, 748 (7th Cir. 1983) (BFOQ exceptions to ADEA must be narrowly construed). ALPA's expansive reading of §623(f)(1) does not comply with these expressed purposes of ADEA. On the contrary it would create an exception that would swallow the Act. Under ALPA's interpretation, for example, a company could lawfully provide fewer retirement benefits to captains retiring at age 60 than to other retiring employees, simply because the position of captain is subject to an age 60 BFOQ. Clearly Congress did not intend to permit such a result any more than it intended to permit an age-based refusal to consider a transfer application submitted by a 60-year old downbidding captain for a flight engineer position, merely because age 60 is a BFOQ for the captain's former job, when the company permits all younger captains who can no longer serve as captains to transfer to the position of flight engineer.

The ADEA requires "that an employee's age be treated in a neutral fashion, neither facilitating nor hindering advancement, demotion, or discharge." *Parcinski v. Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 725 (1983). We conclude that TWA's age-based transfer policy hindered appellants' "demotion," depriving them of the "privilege[] of [continuing] employment" after age 60 and denying them "employment opportunities" in violation of §§623(a)(1) and (a)(2) of the ADEA.

Our holding does not require TWA to provide "special working conditions for older workers to allow them to remain or become employed." H.R. Rep. No. 527, *supra*, at 12; *Parcinski v. Outlet Co.*, *supra*, 673 F.2d at 37. Appellants do not ask for "special treatment," *Parcinski*, *supra*; rather, they merely seek the same treatment accorded all younger captains and first officers who become unable to serve in their former capacities for non-age

reasons. There is nothing "special" or "preferential" about equal treatment.

Nor can TWA avoid its ADEA obligations on the ground that downgrading of captains to the position of flight engineer might in some instances involve some retraining or relocation. TWA retains and relocates all employees, including flight engineers who are over 60, except for captains and first officers who have reached 60. This action is a conscious refusal on the part of TWA to retain or relocate age 60 captains and first officers solely because of their age, in violation of the ADEA. An employer's conscious refusal to consider retaining or downgrading a plaintiff because of his age violates the Act. See, e.g., *Williams v. General Motors Corp.*, 656 F.2d 120, 129-30 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *EEOC v. TWA*, 544 F. Supp. 1187, 1218 (S.D.N.Y. 1982).

Nor does our holding result, as ALPA argues, in the elimination of mandatory retirement before age 70. An employer can lawfully retire an employee because he is beyond the age established as a BFOQ for his position provided that, unlike the situation here, the employer's refusal to consider the employee's request for alternative assignments is not discriminatory. *Compare Coates v. National Cash Register Co.*, 433 F. Supp. 655, 661 (W.D. Va. 1977) (termination for lack of training unlawful when employees were chosen for training on the basis of age), with *Smith v. World Book-Childcraft Int'l, Inc.*, 502 F. Supp. 96, 98-99 (N.D. Ill. 1980) (denial of transfer request by terminated employees lawful under the ADEA when no position was available and failure to transfer was not predicated on impermissible factors).¹⁷

¹⁷ TWA's remaining claim that no statutory violation has been established as to Captain Thurston because his contractual grievance was

In short, because TWA routinely accommodates other employees who seek to downgrade to flight engineer for non-age reasons and has failed to come forward with a permissible reason for its refusal to accord the same treatment to age-60 captains and first officers, the *Thurston* litigants and the EEOC claimants must prevail on their ADEA claim.¹⁸ The sole reason for its discrimination against age-60 captains and first officers is their age; this is prohibited by the ADEA. Accordingly, we reverse and remand the case to the district court for the entry of judgment for appellants against TWA and ALPA, Fed.R.Civ.P. 56(c), as we have power to do. *Abrams v. Occidental Petroleum Corp.*, 450 F.2d 157, 165-66 (2d Cir. 1971), *aff'd sub nom. Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 482 (1973); *International Longshoremen's Ass'n, AFL-CIO v. Seatrains Lines, Inc.*, 326 F.2d 916, 921 n.2 (2d Cir. 1964).

In response to ALPA's contention that summary judgment may not be entered against it because of its status as a union, the ADEA expressly prohibits unions, not just employers, from causing or attempting to cause an employer to engage in unlawful discrimination under

denied by the TWA System Board of Adjustment may be dealt with summarily. The Board's determination of Thurston's rights under the collective bargaining agreement did not resolve any issue pertaining to his claim that his forced retirement violated the ADEA. As the arbitrator expressly stated: "It must be emphasized . . . that in deciding this case, the System Board renders no opinion with respect to any legal rights that Captain Thurston may have under the ADEA." Joint App. 530 (emphasis in original). Cf. *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974) (Title VII rights and remedies are distinct from and independent of those secured through collective bargaining).

¹⁸ Because we determine that TWA and ALPA have failed to come forward with a legitimate, nondiscriminatory reason for their disparate treatment of appellants, we need not consider the third step in the *Burdine* analysis, whether the defendants' reasons were pretextual.

§623(c)(3) of the ADEA. Cf. 42 U.S.C. §2000e(c)(3) (Title VII); *Stamford Board of Education v. Stamford Education Association*, 697 F.2d 70, 73 (2d Cir. 1982). The evidence is undisputed that ALPA caused TWA to institute the requirement that successful downbidders "fulfill their bids in a timely manner," resulting in the cancellation of bids awarded three downbidding EEOC plaintiffs who were unable to complete their training and assume positions as flight engineers before reaching age 60. (JA 1064-1066, 1069, 1074-77). Nor is it disputed that after the 1978 ADEA amendments prohibited mandatory retirement before 70 of employees in positions for which age less than 70 was not a BFOQ, ALPA negotiated, signed, and administered a Working Agreement which retained by incorporation through express reference clauses from the 1977 Retirement Plan for Pilots requiring retirement of all flight deck personnel at 60. Retirement Plan for Pilots, Articles 4.1, 4.2. When a union becomes a party to a discriminatory provision in a collective bargaining agreement binding the employer to an unlawful practice, the union's conduct in aiding and abetting the employer to discriminate against employees renders it independently liable for violation of the ADEA, 29 U.S.C. §623(c)(3). Cf. *Patterson v. American Tobacco*, 535 F.2d 257, 270 (4th Cir.) (Title VII), *cert. denied*, 429 U.S. 920 (1976); *Taylor v. Armco Steel Corp.*, 373 F. Supp. 885 (S.D. Tex. 1973) (same); Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702, 704-05 (1980).

Since ALPA actively campaigned to persuade TWA to retain its age-60 retirement policy for all flight deck positions, opposed TWA's unilateral action in August 1978 to attempt partial compliance with the ADEA and induced TWA to impose further discriminatory restric-

tions on captains seeking to downbid to flight engineer status, ALPA is liable under 29 U.S.C. §623(c)(3) to the EEOC plaintiffs who were damaged by its conduct.¹⁹

C. RELIEF

1. TWA

Appellants have requested an award of back pay, liquidated damages, and appropriate injunctive relief against TWA. Amended Complaint ¶1-11, Joint App., at 66-68. Liquidated or double damages, which are defined as an amount equal to the pecuniary losses sustained by way of lost wages, salary increases and other benefits, 29 U.S.C. §216(b) (incorporated by reference in *id.* §626(b)); *Koyen v. Consolidated Edison Company of New York*, 560 F. Supp. 1161, 1164 (S.D.N.Y. 1983), are available under the ADEA "only in cases of willful violations." *Id.* §626(b). Congress has provided no statutory definition of "willfulness," however, and the legislative history of the ADEA is silent on this point. *Wehr v. Burroughs Corp.*, 619 F.2d 276, 282 (3d Cir. 1980). As we indicated in *Goodman v. Heublein, Inc.*, 645 F.2d 127 (2d Cir. 1981), in a case based on discriminatory treatment, such as the present one, plaintiffs need not prove a specific intent to violate the ADEA; it is sufficient to establish that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA. *Id.* at 131. The reason is that "[i]n a discriminatory treatment

¹⁹ Our conclusion that ALPA's actions in signing the post-1978 Working Agreements and in causing TWA to implement other restrictions on the downbidding older captains and flight engineers render it liable under §623(c)(3) makes it unnecessary for us to consider whether the First Amendment bars consideration of ALPA's liability based on its filing a lawsuit against TWA. See *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972).

case . . . an employer's action, if taken *because of* an impermissible factor such as age, cannot be the result of negligence, mistake, or other innocent reason." *Id.* at 131 n.6 (emphasis in original).

Applying these principles, TWA was clearly aware of the 1978 ADEA amendments; indeed it was required to post them, 29 U.S.C. §627. Its attempt to escape full compliance by authorizing restricted downbidding by captains and first officers approaching 60 does not relieve it of liability for liquidated damages based on its continued discrimination against them through these unlawful restrictions. *Goodman v. Heublein, supra*; *Wehr v. Burroughs Corp., supra*.

2. ALPA

ALPA argues that the remedial scheme of the ADEA, which incorporates that of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§201-218; *Lorillard v. Pons*, 434 U.S. 575, 582 (1978), does not permit actions to recover monetary damages against a labor organization. We agree. Under the FLSA employees may bring actions to recover money damages against employers, *id.* §216(b), and the term "employer" in FLSA expressly excludes labor organizations. *Id.* §203(d). This express statutory incorporation of FLSA precludes a monetary damage award against ALPA. *Neuman v. Northwest Airlines, Inc.*, 28 F.E.P. Cases 1488, 1490-91 (N.D. Ill. 1982).

However, appellants are entitled to recover back pay, an equitable remedy, against the union. *Equal Employment Opportunity Commission v. Air Line Pilots Association, Int'l*, 489 F. Supp. 1003, 1008-10 (D. Minn. 1980), *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981). The union owes a duty to all its members, includ-

ing its over-60 members, not to discriminate against them. See *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944). One of the purposes of a back pay award is to spur unions, as well as employers, to evaluate employment practices and eliminate unlawful discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975).

CONCLUSION

The judgment for TWA against ALPA is affirmed. The judgment in favor of TWA against Thurston and the EEOC is reversed and remanded to the district court with directions to enter judgment for appellants against TWA and ALPA and to award to each plaintiff such amount as may be found due against each defendant in accordance with this opinion, after such evidentiary hearing as may be necessary for that purpose.



VAN GRAAFEILAND, *Circuit Judge*, concurring in part and dissenting in part:

I concur with the majority that the judgment in favor of Trans World Airlines, Inc. and against Air Line Pilots Association International should be affirmed. I dissent from the majority's reversal of the judgment in favor of TWA and against Thurston and the EEOC.

If I understand the basis for the latter holding, it is that pilots who reach 60 years of age are treated less favorably than younger pilots who sustain disabling injuries or whose positions are eliminated at a domicile by reductions in force. In my opinion, this is like comparing

apples with oranges. A pilot does not know in advance that he is going to break his leg or that company economies will eliminate the job he is performing. However, a pilot knows the exact date on which he will become 60 years of age and that after that date, FAA regulations will no longer permit him to work as a pilot. Unlike a disabled younger man, a healthy pilot, 60 years of age, cannot go on unpaid medical leave for up to five years. For similar reasons, a 60 year old pilot should not be entitled to take a ten year furlough from a job he is forbidden by law to perform, accruing seniority status in the process. I don't believe Congress intended that such a pilot should be permitted to take a nine-year vacation and return to work at the age of 69, displacing a younger flight engineer, who might have a spouse and family but who has less seniority.

Apparently, TWA is the only trunk airline that voluntarily has permitted pilots over 60 to continue working as flight engineers. Instead of receiving commendation for what it has done, TWA is held liable as a matter of law for age discrimination. I would affirm the judgment of the district court.

ERRATA

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5448	19	monetary damages against	monetary damages, including back pay, against
5448	24	monetary damage	monetary damage or back pay
5448	26	1982).	1982) <i>see Brennan v. Emerald Renovators, Inc.</i> , 410 F. Supp. 1057, 1059 n. 5 (S.D.N.Y. 1975).
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5449	13-14	amount or may be found due	relief as it is entitled to

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/s/ S.R. Waterman/W.R. Mansfield
 U.S. Circuit Judges

810/3/83

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VAN GRAAFEILAND, *Circuit Judge*, concurring in part and dissenting in part:

I concur with the majority that the judgment in favor of Trans World Airlines, Inc. and against Air Line Pilots Association International should be affirmed. I dissent from the majority's reversal of the judgment in favor of TWA and against Thurston and the EEOC.

If I understand the basis for the latter holding, it is that pilots who reach 60 years of age are treated less favorably than younger pilots who sustain disabling injuries or whose positions are eliminated at a domicile by reductions in force. In my opinion, this is like comparing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, ...
and for the Second Circuit, held at the United States
Courthouse, in the City of New York, on the tenth day of
November, one thousand nine hundred and eighty-three.

Nos. 82-6266, 82-6306, 82-6280

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Plaintiff-Appellant,

—v.—

TRANS WORLD AIRLINES, INC.,
Defendant-Appellee,

HAROLD H. THURSTON, et al., and
NICHOLAS VASILAROS, et al.,
Defendants-Intervenors Appellees.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK
and C.A. PARKHILL,
Plaintiffs-Appellants,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Intervenor Appellant,

—v.—

TRANS WORLD AIRLINES, INC., and AIR LINE PILOTS
ASSOCIATION, INTERNATIONAL,
Defendants-Appellees.

A petition for rehearing containing a suggestion that the
action be reheard in banc having been filed herein by counsel
for the appellant, Air Line Pilots Association, International,

Upon consideration by the panel that heard the appeal, it is
Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc
has been transmitted to the judges of the court in regular active
service and to any other judge on the panel that heard the
appeal and that no such judge has requested that a vote be
taken thereon.

A. Daniel Fusaro, Clerk
/s/ VICTORIA C. DALTON
by Victoria C. Dalton,
Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the tenth day of November, one thousand nine hundred and eighty-three.

Nos. 82-6266, 82-6306, 82-6280

AIR LINE PILOT ASSOCIATION, INTERNATIONAL,
Plaintiff-Appellant,

—v.—

TRANS WORLD AIRLINES, INC.,
Defendant-Appellee,

HAROLD H. THURSTON, et al., and
NICHOLAS VASILAROS, et al.,
Defendants-Intervenors Appellee.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK
and C.A. PARKHILL,
Plaintiffs-Appellants,
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Intervenor Appellant,

—v.—

TRANS WORLD AIRLINES, INC., and AIR LINE PILOTS
ASSOCIATION, INTERNATIONAL,
Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellee, Trans World Airlines,

Upon consideration by the panel that heard the appeal, it is
Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk
/s/ VICTORIA C. DALTON
by Victoria C. Dalton,
Deputy Clerk

UNITED STATES DISTRICT COURT
S. D. NEW YORK

Sept. 13, 1982

Nos. 78 Civ. 3707 (KTD), 79 Civ. 4915 (KTD).

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Plaintiff,

—v.—

TRANS WORLD AIRLINES, INC.,
Defendant.

HAROLD H. THURSTON, et al.,
Plaintiffs,

—v.—

TRANS WORLD AIRLINES, INC., et al.,
Defendants.

Cohen, Weiss & Simon, New York City, for Air Line Pilots Ass'n, Intern.; Michael E. Abram, Jay P. Levy-Warren, New York City, of counsel.

Chadbourn, Parke, Whiteside & Wolff, New York City, for Trans World Airlines, Inc.; Donald I. Strauber, Henry J. Oechler, Jr., New York City, of counsel.

O'Donnell & Schwartz, New York City, for intervenors Vasilaros; Asher W. Schwartz, New York City, of counsel.

Haley, Bader & Potts, Chicago, Ill., Grau & Weiner, P. C., New York City, for Thurston plaintiffs; Raymond C. Fay, Alan M. Serwer, Susan D. Goland, Chicago, Ill., Leonard Grau, New York City, of counsel.

Michael Connolly, Gretchen Houston, Ivan Rivera, Jason Hegy, Paul D. Brenner, Washington, D. C., Saul Krenzel, New York City, for plaintiff-intervenor E. E. O. C.

OPINION

KEVIN THOMAS DUFFY, *District Judge:*

Airline Pilots Association, International ("ALPA"), the bargaining representative of airline pilots and flight engineers, sued Trans World Airlines, Inc. ("TWA") alleging that amendments to the Age Discrimination and Employment Act ("ADEA") did not require TWA's implementation of a policy permitting flight engineers to serve past the age of sixty. TWA has also been sued by a group of pilots and the Equal Employment Opportunity Commission ("EEOC") who claim that TWA's policy that allows flight engineers past the age of sixty to continue in TWA's employ discriminates against pilots. Both cases have been consolidated and are before me now on motions by TWA for summary judgment. For the reasons that follow, TWA's motions are granted.

I.

In 1978, Congress amended the ADEA to prohibit, *inter alia*, an employee's involuntary retirement before the age of seventy solely by reason of his age even if in accordance with a bona fide employee benefit plan.¹ Prior to this amendment, the

¹ In addition to enlarging the protected age group to include sixty-five to seventy year olds, the 1978 Amendments added new language to 28 U.S.C. 623(f)(2) which reads as follows:

ADEA allowed employers to compel retirement before the age of sixty-five if this was part of a bona fide employee benefit plan and was not a subterfuge to evade the purposes of the ADEA. See *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 98 S.Ct. 444, 54 L.Ed.2d 402 (1977). The amended ADEA permits involuntary retirement before age seventy only where:

1. "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business",
2. "the differentiation is based on reasonable factors other than age," or
3. the forced retirement is in accordance with "a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of [the ADEA] . . .," and was not as a result "of the age of the individual." 29 U.S.C. § 623(f) (1978).

In response to this change in the law, TWA commenced a review of its July, 1977 collective bargaining agreement ("the 1977 Working Agreement") with ALPA.² The 1977 Working Agreement included a Retirement Plan which provided for retirement at age sixty "unless written approval of the Company is granted for continuance in employment." Sections 4.1, 4.2 of the Retirement Plan. TWA Exhibit 3. This retirement

(f) it shall not be unlawful for an employer, employment agency, or labor organization—

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual

(emphasis added to indicate new language).

² New collective bargaining agreements were signed between ALPA and TWA on April, 1979 and April, 1982.

date had been in effect for many years and, in fact, for the past two decades prior to 1978 no one over the age of sixty had served in the cockpit of a TWA aircraft. Crombie Affidavit ¶ 7. This is consistent with the policy of the Federal Aviation Administration ("FAA") which since 1960 has mandated retirement at age sixty for Captains and First Officers. 14 C.F.R. § 121.383(c). Several courts have viewed this age limitation as a bona fide occupational qualification for pilots within the meaning of the ADEA, 28 U.S.C. § 623(f)(1). See, e.g., *Starr v. FAA*, 589 F.2d 307, 313 (7th Cir. 1978); *Criswell v. Western Air Lines, Inc.*, 514 F.Supp. 384, 389 (C.D.Cal.1981).

The FAA has not imposed any age limitation on Flight Engineers, who are responsible for monitoring the mechanical, electrical and electronic functioning of the aircraft while it is in flight.

The 1978 ADEA amendments prompted TWA to determine whether or not members of the cockpit crew, which include on most commercial jets a Captain, a First Officer (co-pilot) and a First Engineer, fall within one of the exceptions to the new general rule that a company could not retire employees prior to age seventy. TWA met with representatives from ALPA to discuss the impact of the amendments but no consensus could be reached. On August 10, 1978, TWA went ahead and announced a new corporate policy in a bulletin to all TWA flight personnel. TWA Exhibit 5. The bulletin proclaimed "any cockpit crew member who is in a Flight Engineer status at age sixty may not be compelled to retire. The terms and conditions of employment for Flight Engineers who elect to work beyond age sixty will be governed by the provisions of the current Working Agreement." The bulletin further explained that "Flight Engineers will be subject to the provisions of the Federal Air Regulations applicable to TWA's operations and as such may not under any circumstances serve as a pilot after attaining age 60."

It is necessary to set forth TWA's implementation of this policy at some length. Flight Engineers who retired at age sixty after April 6, 1978, the effective date of the ADEA amend-

ments, were notified by letter that they would be given the opportunity to be reinstated as a Flight Engineer. Flight Engineers reaching their 60th birthday after August 10, 1978 continued in that status. Apparently, although no new "retirement date" for Flight Engineers was specifically established under TWA's new policy, it is presumed to be age seventy.

Captains seeking to become Flight Engineers in order to continue working past age sixty had to change their status to Flight Engineer pursuant to bidding procedures set forth in the Working Agreement. The Working Agreement outlines these procedures that provide a mechanism for the possible deployment of TWA's entire pilot workforce. The procedures apply to any TWA pilot, under age sixty, who seeks to change status or location. The affidavit of Joseph Bryner, the director of Flight Crew Resources for TWA, describes these procedures. A pilot wishing to change his status or his domicile files a "Standing Bid" which shows his present status and domicile and lists his preferences for a new status. See TWA Exhibit 19. TWA is then obligated to publish bulletins listing the available vacancies on which pilots can bid. The number of vacancies, of course, changes with TWA's staffing and contractual needs. Available TWA pilot domiciles may include New York, Chicago, St. Louis, Kansas City, San Francisco and Los Angeles. As might be expected, in any bidding situation for a vacancy, the bidders frequently outnumber the vacancies and not all bids can be accommodated. In an effort to be fair, the Working Agreement provides that in each instance the selection process is based upon a pilot's seniority at TWA. This seniority system and the bidding procedures have existed at TWA since before 1967. Of course, with the advent of the opening of Flight Engineer jobs to pilots over age sixty, the procedures have received new found attention. A TWA Captain who chooses to downbid to Flight Engineer files a bid for such a vacancy prior to his 60th birthday. "If there is such a vacancy at the domicile where a downbidding Captain has requested to be assigned and that Captain has the highest seniority, then he is granted the bid in accordance with the provisions of the Working Agreement." Bryner Affidavit ¶ 11.

After the April 6th effective date of the 1978 ADEA amendments, there was an approximate four month period during which TWA did not post any Flight Engineer vacancies. On August 18, 1978, TWA listed twelve Flight Engineer vacancies that were to become effective on or about September 1, 1978. Two captains bid for these positions and were later awarded them. After being trained for the Flight Engineer position these captains switched jobs before they reached age sixty and consequently they were not forced to retire.

According to Bryner, as of February, 1982, approximately sixty former Captains have successfully downbid to Flight Engineer and thus have served in the cockpit after age sixty. Bryner Affidavit ¶ 18. Several TWA captains, like Harold H. Thurston, who reached age sixty between April 6, 1978 and August 18, 1978 were unable to bid successfully for a Flight Engineer position. These Captains had to retire from pilot status, as required by FAA regulations, and from the company since no alternative positions became available before their 60th birthdays.

TWA's change in policy which allows Flight Engineers to continue in their jobs after age sixty, resulted in a number of lawsuits. Two of these suits are now consolidated before me. In the first case, *ALPA v. TWA*, 78 Civ. 3707, ALPA charges first that TWA's policy of allowing anyone to serve in the cockpit beyond age sixty constitutes a unilateral change in working conditions in violation of Section 6 of the Railway Labor Act ("RLA"), 45 U.S.C. § 156, and second, that ALPA is entitled to a declaratory judgment as to whether TWA's policy was required by the ADEA amendments. Certain "career" Flight Engineers³ have intervened on the side of TWA in an effort to maintain the status quo.

³ Career Flight Engineers are those Flight Engineers employed by TWA who were on the seniority list on June 21, 1962, the date when TWA and the Flight Engineers International Association signed a Crew Compliment Agreement granting such Flight Engineers prior rights to all Flight Engineer positions required by the Company's operations. Vasilaros Affidavit. The *Thurston* plaintiffs in their memorandum in opposition to the instant motion refer to these Flight Engineers as International Relief Officers.

In the second case, *Thurston v. TWA*, 79 Civ. 4915, several TWA Captains, including Thurston, have sued TWA alleging, *inter alia*, that TWA's mandatory retirement at age sixty is in violation of the ADEA and that ALPA and TWA have "conspired" to deprive the plaintiffs of their rights under the ADEA. In August, 1980 I permitted the EEOC to intervene in this second case to represent the interests of the many similarly situated pilots and flight engineers.⁴

II.

TWA now moves for summary judgment on the claims against it in both *ALPA v. TWA* and *Thurston v. TWA*. The intervening career Flight Engineers join in TWA's motion in *ALPA*. I will address TWA's motions in the context of each case separately.

1. *ALPA v. TWA*

The first cause of action in *ALPA v. TWA* alleges that TWA's "[e]limination of mandatory age sixty retirement for TWA flight deck crew constitutes a major change in existing terms and conditions of employment by TWA, as embodied in the Agreement and otherwise, in violation of the [Railway Labor Act], 45 U.S.C. § 152, 155 and 156." Complaint ¶ 15. The merits of this claim have already been addressed by me on a motion by ALPA to declare TWA's policy in violation of the

⁴ A third case, *Cafferty v. TWA*, 80 Civ. 3481, was brought against TWA in the Western District of Missouri by a group of furloughed TWA Flight Engineers alleging that they should be reinstated in their jobs pending a determination from the National Mediation Board. The *Cafferty* plaintiffs argue that TWA should be compelled to negotiate the effects of TWA's policy of allowing Flight Engineers to serve beyond age sixty under the RLA. After *Cafferty* was transferred to my docket, I granted TWA's motion to dismiss the complaint because TWA's age sixty policy did not violate the RLA as explained in an earlier decision of mine in *ALPA v. TWA*, 506 F.Supp. 236 (S.D.N.Y. 1980). In *ALPA*, I had ruled that the dispute over TWA's new policy was not a "major" dispute to which the RLA requires that its mandatory bargaining procedures be applied.

RLA. On January 26, 1981, I ruled that "a major dispute between TWA and ALPA does not exist" because "TWA's new retirement policy is neither contrary to nor inconsistent with the agreement between TWA and ALPA." 506 F.Supp. 236, 238 (S.D.N.Y. 1981). For this reason, the RLA procedures which must be followed before any action can be taken to alter existing terms and conditions of employees did not have to be followed. This reasoning is equally applicable here and leads to the conclusion that no violation of the RLA has occurred. Accordingly summary judgment is granted for TWA as to this first claim.

ALPA argues that in any event this court should retain jurisdiction over the RLA claims pending resolution of issues now before the TWA Pilot's System Board of Adjustment. *Cf. Order of Railway Conductors v. Pitney*, 326 U.S. 561, 66 S.Ct. 322, 90 L.Ed. 318 (1946). Four grievances are currently pending before the System Board which challenge the contractual right of TWA, under both the 1977 and 1979 working agreements, to employ flight engineers older than sixty. ALPA has placed these grievances in inactive status in order to obtain a judicial resolution of the claim by TWA that the ADEA precludes the forced retirement of flight engineers older than sixty. Under the circumstances, it appears that resolution of the parties' "minor dispute" is best left in the hands of the System Board as contemplated by the RLA. *See Rutland Railway Corp.*, 307 F.2d 21, 32 (2d Cir. 1962), *cert. denied*, 372 U.S. 954, 83 S.Ct. 949, 9 L.Ed.2d 978 (1963). No purpose would be served by this court retaining jurisdiction over this claim which has already been determined to be a minor dispute.

ALPA's second claim raises more subtle issues which call for an interpretation of the ADEA and strike to the heart of this entire controversy. ALPA seeks a declaratory judgment that the ADEA does not require TWA to retain Flight Engineers beyond the age of sixty. ALPA submits that the Working Agreement defines all TWA flight deck crew members as pilots and requires that all TWA pilots possess a currently effective commercial pilot's certificate and other pilot qualifications. Complaint ¶ 24. As a result, the FAA's regulation that no

person may serve as a pilot on an airplane past his 60th birthday applies to all TWA flight deck crew members. Stated differently, ALPA contends that retiring Flight Engineers at age sixty is conduct protected by the ADEA's bona fide occupational qualification exception. 29 U.S.C. § 623(f)(1).

ALPA also argues that TWA may retire Flight Engineers at sixty because such a policy is not covered by the 1978 amendment to the ADEA which provides that no such employee benefit plan shall require or permit the involuntary retirement of any individual in the protected age group because of his age. According to ALPA, the effective date of the ADEA amendments "is deferred . . . until termination of the [Working] Agreement or January 1, 1980, whichever occurs first." Complaint ¶ 25. Thus, ALPA contends that TWA's policy of retiring Flight Engineers at sixty is protected under the old law. This latter point has been mooted by the passage of time since there is now no question that the ADEA amendments have become effective. The only issue that remains is whether Flight Engineer retirement at age sixty is a bona fide occupational qualification within the meaning of the ADEA.

The simple answer to this question is no. ALPA concedes that the FAA regulation requiring pilots to retire at age sixty applies only to the Captain and First Officer, not the Flight Engineer. ALPA's Memorandum at p. 11. The Deputy Assistant Chief Counsel of the FAA explicitly states that the regulation is not applicable to Flight Engineers who do not perform pilot "services." TWA Exhibit 42. Because the FAA has seen fit not to place Flight Engineers within the scope of the age sixty rule, ALPA cannot effectively argue that mandatory retirement at age sixty is a bona fide occupational qualification for Flight Engineers. Additional support for this proposition is found in *Criswell v. Western Air Lines, Inc.*, 514 F.Supp. 384, 391 (C.D. Cal. 1981), where the district court, faced with the identical issue specifically ruled that retirement at age sixty "is not a bona fide occupational qualification"

ALPA's arguments to the contrary are unpersuasive. First, ALPA asserts that the distinctions in responsibility between the

pilot, the co-pilot and the flight engineer are minimal. In a report by the Institute of Medicine, it was stated that the responsibilities of these three persons who occupy an airplane's cockpit "are specific but overlap considerably, and all involve tasks of information gathering, problem solving, decision making, psychomotor coordination, and transmission of information to the other components of a complex man-machine system." ALPA Exhibit J at p. 21. Thus, ALPA argues Flight Engineers need to have the same qualifications as pilots and should also be subject to the same age limitations.

Second, ALPA submits that the medical bases for the FAA age sixty rule for pilots has equal application for Flight Engineers as indicated by the greater number of Flight Engineer trainees over age sixty than under age sixty who failed to qualify for these positions.

Third, ALPA argues that insofar as the safety of a flight is concerned the Flight Engineer is a crucial member of the cockpit, no less so than the pilot. TWA's own flight operation department stated that the use of flight engineers younger than age sixty would be safer for TWA flight operations than using flight engineers older than sixty. See Frankura Deposition at 96-97, 110-111, 159, 162. Congress mandates that airlines operate their business with the 'highest degree' of care. See *Murnane v. American Airlines*, 667 F.2d 98 (D.C.Cir. 1981), cert. denied, ____ U.S. ____, 102 S.Ct. 1770, 72 L.Ed.2d 174 (1982). This rigorous standard, according to ALPA, gives TWA the prerogative to establish its own standards of safety and to declare age sixty a bona fide occupational qualification for Flight Engineers.

ALPA's arguments must be rejected. Neither the FAA nor TWA has determined that an age sixty retirement date is a significant safety factor in flight operations. As the Court in *Murnane* reasoned, "Courts, in our view, do not possess the expertise with which, in a cause presenting safety as the critical element, to supplant their judgments for those of the employer." 667 F.2d at 101. I would add that a court should defer on this question at least in the first instance, to the expertise of the federal agency responsible for regulating safety in the

airline industry. Furthermore, despite whatever medical evidence ALPA can muster, the FAA is the expert in this area and is in a better position than this court to judge the physical demands placed upon the crew of an aircraft and the qualifications necessary to fulfill the various roles on board a plane. Although TWA may be able to create, through an independent assessment of safety risks, a bona fide occupational qualification, see *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (1976); *Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980), there is no convincing evidence in the record that TWA should do so for Flight Engineers sixty and under. Even if such evidence existed, I see nothing in the ADEA or in the Working Agreement which requires TWA to establish such a qualification.

The FAA and the National Institute of Aging are presently considering the question of requiring cockpit crew members to retire at age sixty. It is possible that at some future date ALPA's views will be vindicated by these entities. Until that time, it appears that the ADEA prevents TWA from enforcing the Working Agreement's mandatory retirement at age sixty. Accordingly, TWA's motion for summary judgment on ALPA's second cause of action is granted.

2. *Thurston and EEOC v. TWA and ALPA*

The Working Agreement's mandatory retirement age of sixty for pilots is challenged in *Thurston* as violative of the ADEA. The plaintiffs in *Thurston* are three crew members, Thurston, C. Clark and Parkhill, who were mandatorily retired by TWA at age sixty. Plaintiff-Intervenor EEOC seeks relief on behalf of all other crew members whose ADEA rights may have been violated by TWA and ALPA. These other crew members (hereinafter referred to as "EEOC claimants") may be divided into two groups—eight Captains who have been mandatorily retired by TWA, and all Captains or First Officers who were required to downgrade to the lower paying position of Flight Engineer. All of the plaintiffs assert that ALPA has caused or attempted to cause TWA to discriminate on the basis of age,

and that ALPA has discriminated against crew members based on age by, *inter alia*, failing to represent them and by limiting their employment opportunities. Finally, the *Thurston* plaintiffs contend that TWA and ALPA have retaliated against them for having challenged the instant actions.

TWA, joined by ALPA, moves for summary judgment in *Thurston* arguing that some of the plaintiffs have not demonstrated a *prima facie* case of age discrimination and that others who may have established a *prima facie* case were only victims of a nondiscriminatory bona fide seniority program. TWA also points to a ruling by the TWA System Board of Adjustment which rejected a grievance by plaintiff Thurston identical to the one he and other plaintiffs make here as proof of the failure of the plaintiffs' *prima facie* case. Finally, TWA points out that the implementation of its age sixty policy has not had a disparate impact on those pilots wishing to become Flight Engineers.

To establish a *prima facie* case of age discrimination under the ADEA a plaintiff must show:

1. he was a member of the protected age group;
2. he was terminated;
3. there was a vacancy in the position sought at the time he applied;
4. he was qualified for the position sought.

McDonnell Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).⁵ After the establishment of a *prima facie* case, the defendants must then "articulate some legitimate,

⁵ Plaintiffs offer an alternative formulation to this *McDonnell Douglas* test, to wit:

1. Plaintiff possesses the basic skills necessary for the performance of the job, and
2. the job was filled by someone else.

This alternative is based on an ADEA case in the Second Circuit, *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914, 921 (2d Cir. 1981). I view the two tests as virtually identical.

nondiscriminatory reason for the employee's rejection" 411 U.S. at 802, 93 S.Ct. at 1824. A review of the various claims by the *Thurston* plaintiffs and the EEOC, along with the supporting proof, reveals that prongs one, two and four of the *McDonnell* test were facially satisfied. All of the plaintiffs and EEOC claimants are members of the protected age group, *i.e.*, between the age of forty and seventy; 29 U.S.C. § 631(a); each of them was terminated as pilots and forced to retire; most of them were "qualified for the position sought," *i.e.*, they were qualified to bid for and receive the position of Flight Engineer. For a variety of reasons none of them received a Flight Engineer job. However, a review of the circumstances underlying each individual pilot's failure to obtain the Flight Engineer job reveals that no age discrimination has occurred.

Plaintiff Thurston submitted a bid for a Flight Engineer's position in June, 1978 before his 60th birthday. This bid was rejected by the time he turned sixty because of the lack of vacancies and he was forced to retire.

Plaintiff C. Clark wrote to TWA in July, 1978, prior to his 60th birthday, stating his intention to serve as a flight crew member beyond age sixty. On August 3, 1978, TWA told Clark that subject to a change in policy he would not be able to serve as a Flight Engineer beyond age sixty and that no vacancies existed at that time.

In August, 1978 plaintiff Parkhill also made a bid for a Flight Engineer's position before reaching age sixty. This bid was rejected due to lack of vacancies.

These three plaintiffs allege that their forced retirements were the result of age discrimination as evidenced by the fact that (1) certain TWA pilots under age sixty had been permitted to switch into Flight Engineer jobs, and (2) at least two employees under the age of sixty who were not working as Flight Engineers received positions as Flight Engineers without having placed any bids.

The pilots involved in this case were denied bids and forced to retire either because there were no Flight Engineer vacancies between the time they elected to bid and the time of their 60th birthdays or because no vacancies existed between the effective

date of the ADEA amendments, April 6, 1978, and the effective date of the first Flight Engineer vacancy, September 1, 1978.⁶ Two exceptions were C. Clark who declined to bid for any available Flight Engineer vacancies in accordance with the Working Agreement, and A. T. Humbles who bid on an available vacancy that was awarded, however, to someone with greater seniority. From these undisputed facts these plaintiffs and claimants cannot establish a *prima facie* case of discrimination solely because no job vacancy existed at the time they applied and were eligible for the job. TWA was legally obligated to remove these pilots at age sixty under the FAA regulations. TWA was not obligated, however, to offer these ex-pilots jobs which did not exist. To the extent jobs existed, TWA was justified in relying upon a seniority bidding system. See *Criswell v. Western Air Lines, Inc.*, 514 F.Supp. at 384.

Plaintiffs and the EEOC insist that a *prima facie* case can still be demonstrated despite the *McDonnell Douglas* formula by examining all of the evidence for either an inference of age discrimination or proof of a disparate impact. Support for these alternatives is derived from *Stone v. Western Air Lines, Inc.*, 544 F.Supp. 33 (C.D.Cal. 1982). In *Stone*, Judge Tashima, the author of *Criswell v. Western Air Lines, Inc.*, 514 F.Supp. at 384, was faced with the question of "whether age-sixty captains seeking to downbid to second officer positions may continue to retain their seniority rights after age sixty and exercise them when vacancies occur." At 35. The plaintiffs' claim in *Stone* was that pilots over sixty should be treated the same as flight deck employees who lose their jobs due to elimination of particular flights or positions, or due to medical disabilities and who are not severed from employment. These employees go on furlough or remain in a "displacement pool."

⁶ Two other claimants, Enrich and John Clark, were initially awarded Flight Engineer bids but they failed to produce adequate proof at the time of training that they had passed the FAA Flight Engineer written exam. Thereafter, between the time they re-bid and their 60th birthdays there were no vacancies. TWA Exhibits 35 and 36.

The district court found that the plaintiffs had presented sufficient evidence to support a theory of discrimination. Deposition testimony of employees indicated

"that Western routinely set aside and refused to consider the bids of captains nearing age sixty seeking second officer positions. Additionally, plaintiffs point to Western's Statement of Corporate Policy, adopted after the decision in *Criswell*, as manifesting continued intent to discriminate on the basis of age. Finally, they rely on evidence, first presented in *Criswell*, that a majority of pilot movement occurs not through bidding for vacancies but through displacement and other mechanisms. This point is underscored by evidence that Western and ALPA signed a special agreement, outside of the regular Pilot Agreement, for the sole purpose of maintaining the employee status of 737 second officers whose positions had been eliminated. No such efforts were made to accommodate age-sixty captains seeking second officer position."

At 36. From this evidence, the court concluded that only age-sixty captains seeking to downbid were severed while other employees were not. It was found that this established a *prima facie* case of discriminatory treatment. In addition, the court found evidence of a disparate impact in the company's program adopted outside of the Pilot Agreement for the 737 Second Officer Pool.

Although I do not subscribe to much of the court's reasoning in *Stone*, I find that it is distinguishable from the case at bar. The *Thurston* plaintiffs and EEOC claimants have not pointed to any evidence from which discriminatory treatment can be inferred. Plaintiffs do assert that other crew members move from one position to another without a "bid" and without regard to whether there is an existing "vacancy." This includes instances where pilots downgrade to Flight Engineer due to medical, training, disciplinary, or proficiency factors. Furthermore, Flight Engineers can simply stay in their jobs past age sixty without regard to the amount of bids and vacancies outstanding. Also, because the pilots must receive a

bid for Flight Engineer before they reach age sixty or else retire, pilots who wish to avoid mandatory retirement are required to take an involuntary demotion before they reach age sixty.

I do not believe, however, that these practices constitute the discriminatory treatment found in *Stone*. There is no evidence here of a separate agreement between the union and the airline whereby a certain group of pilots maintain an employee status beyond age sixty while others do not. TWA is entitled to have a seniority system for each position in the cockpit. As will be discussed, TWA is following this seniority system in a nondiscriminatory fashion. The fact that pilots with medical problems may be downgraded to Flight Engineer regardless of the lack of any vacancies while pilots approaching age sixty must bid for such positions is not violative of the ADEA. Nor is TWA's forced retirement of those pilots who reach sixty at a time when there are no vacancies illegal. Although such a rule may seem harsh, it is applied impartially, unlike the situation in *Stone*, and is pursuant to a bona fide seniority system. TWA was not obligated to offer plaintiffs positions that did not exist, see *Criswell v. TWA*, 514 F.Supp. at 391, n.13, nor was it obligated to keep them on as dormant employees until openings in the Flight Engineer status arise. TWA did not afford such a privilege to other employees and it cannot be violative of the ADEA for TWA not to do so for pilots over age sixty. The 1978 ADEA amendments were not designed to compel employers "to provide special working conditions for older workers to allow them to remain or become employed." H.R.95-527, p.12. Rather, the amendments require that "an employee's age be treated in a neutral fashion, neither facilitating nor hindering advancement, demotion, or discharge." *Parcinski v. Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982). TWA has met these obligations.

The ADEA provides that an employer may take action to observe the terms of a bona fide seniority system which is not a subterfuge to evade the purposes of the ADEA and which "does not require or permit the involuntary retirement" prior to age seventy. 29 U.S.C. § 623(f)(2). See *EEOC v. Home*

Insurance Co., 672 F.2d 252, 257 (2d Cir. 1982). The bidding procedures under the Working Agreement follow a seniority system which was instituted for nondiscriminatory reasons and is applied in a neutral manner. See *Cates v. Trans World Airlines, Inc.*, 561 F.2d 1064, 1074 (2d Cir. 1977). The seniority system was instituted well before the effective date of the ADEA amendments and is not in any way predicated upon age; rather, it depends solely on length of service with the company. Thus, any denial of Flight Engineer status to pilots resulted from the neutral application of this bona fide seniority system and not by discriminatory treatment on the basis of age. Their forced retirement at age sixty was due solely to their reaching that age while in the pilot status. As earlier stated, age sixty is a bona fide occupational qualification for airline pilots by virtue of the FAA regulations. See *Starr v. FAA*, 589 F.2d at 313; *Criswell*, 514 F.Supp. at 389. TWA properly complied with the terms of the Working Agreement and the FAA regulations.⁷

Finally, the plaintiffs and EEOC claimants assert that they have established, or could establish through additional discovery, a *prima facie* violation of the ADEA by a showing of disparate impact upon them. They cite in support of this proposition *Geller v. Markham*, in which the Second Circuit found that the disparate impact resulting from an employer's facially neutral practice was sufficient to establish a *prima facie* case of an ADEA violation. 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945, 101 S.Ct. 2028, 68 L.Ed.2d 332 (1981). This argument, however, also must fail. Disparate

⁷ Plaintiffs' argument that TWA may not raise this point on this motion is specious. Although a defense under 29 U.S.C. § 623(f)(2) was not raised in TWA's answer, plaintiffs have been made aware of it by TWA's counsel's response to plaintiffs' interrogatories on April 15, 1981. TWA Exhibit 47, p. 4. Thus, TWA can amend its answer under Fed.R.Civ.P. 15. To the extent that my decision on this motion rests on this defense, plaintiffs are not prejudiced thereby. Plaintiffs have had adequate opportunity through discovery since at least April, 1981, to develop any reply to this defense.

impact alone, does not establish an ADEA *prima facie* case, when, as here, a seniority system is involved.⁸

Geller requires "that [the] principles with respect to discriminatory racist impact in violation of Title VII . . . govern age discrimination cases instituted under [the ADEA, because] . . . 'the (substantive) prohibitions of the ADEA were derived in *haec verba* from Title VII.'" *Id.* at 1032, *quoting Lorillard v. Pons*, 434 U.S. 575, 584, 98 S.Ct. 866, 872, 55 L.Ed.2d 40 (1978). The Supreme Court, in a recent Title VII case addressed itself to a seniority system such as the one involved here, and expressly stated that "discriminatory impact is not alone sufficient to invalidate the system; actual intent to discriminate must be proved." *American Tobacco Co. v. Patterson*, ___ U.S. ___, 102 S.Ct. 1534, 71 L.Ed.2d 748 (1982). The claimants, however, failed to present any evidence of discriminatory intent, and, in fact, did not even allege the existence of any such intent. Accordingly, TWA and ALPA's motion for summary judgment in *Thurston* is granted.

III.

In sum, TWA's motion for summary judgment in both *ALPA v. TWA*, 78 Civ. 3707 (KTD) and *Thurston v. TWA*, 79 Civ. 4915 (KTD) is granted. The complaints are dismissed.

SO ORDERED.

⁸ Moreover, the court notes that TWA provided evidence that virtually precludes a finding of disparate impact. For example, according to unrebutted evidence, eighty-three percent of those Captains seeking to serve beyond age sixty after April 6, 1978 have served or are now serving as Flight Engineers. It is not, however, necessary to address this issue absent any evidence of TWA's intent to cause disparate impact.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

**HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A.
PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COM-
MISSION, and AIR LINE PILOTS ASSOCIATION, INTER-
NATIONAL,**

Respondents.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS
HAROLD H. THURSTON, CHRISTOPHER J. CLARK,
AND C.A. PARKHILL IN OPPOSITION

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January 1984

**COUNTERSTATEMENT
OF QUESTIONS PRESENTED**

1. Whether the Second Circuit's interpretation of "willfulness" under the Age Discrimination in Employment Act (ADEA) is consistent with that of the other Circuits, and whether the undisputed facts justified its finding a willful ADEA violation.
2. Whether this Court should decline to consider a union liability issue raised by an employer for the first time in this Court, where the aggrieved employees do not seek review at this time.
3. Whether an employer that accommodates all younger employees disqualified from their positions for any reason but refuses to similarly accommodate employees at age sixty has violated the Age Discrimination in Employment Act.

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No. 83 - 997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

**HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A.
PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COM-
MISSION, and AIR LINE PILOTS ASSOCIATION, INTER-
NATIONAL,**

Respondents.

**On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Second Circuit**

BRIEF FOR RESPONDENTS

**HAROLD H. THURSTON, CHRISTOPHER J. CLARK,
AND C.A. PARKHILL IN OPPOSITION**

Respondents Harold H. Thurston, Christopher J. Clark,
and C.A. Parkhill (the *Thurston* respondents) respectfully
pray that the Petition for a Writ of Certiorari of Trans
World Airlines, Inc. (TWA) be denied.

COUNTERSTATEMENT OF THE CASE

Prior to 1978, TWA did not employ flight deck crewmembers over age sixty. The provisions of the TWA pilot retirement benefit plan set a crewmember's sixtieth birthday as his "normal retirement date" (A-8, A-32).¹ As amended on April 6, 1978, the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* (ADEA) prohibits employers from requiring retirement before age seventy under the terms of an employee benefit plan. 29 U.S.C. §623(f)(2); A-7. Following the amendments, TWA determined that it was obligated to employ flight deck crewmembers as flight engineers² beyond age sixty (A-4; P.5-6). TWA and the Air Line Pilots Association, International (ALPA), the collective bargaining agent for crewmembers employed by TWA, failed to agree on revisions to the retirement plan (A-9). On August 10, 1978, TWA issued a bulletin authorizing the employment of "any cockpit crewmember who is in a flight engineer status at age 60," retroactive to April 6, 1978 (A-9).³ The bulletin did not

¹ The following abbreviations are used in this brief: "A-____" refers to the Appendix to TWA's Petition for a Writ of Certiorari; "P-____" refers to TWA's Petition for a Writ of Certiorari; "J.A.____" refers to the Joint Appendix filed in the Court of Appeals.

² A Federal Aviation Administration regulation, 14 C.F.R. §121.383(c) (the Age 60 Rule), prohibits crewmembers from serving as Captains (pilots-in-command), First Officers (co-pilots), or International Relief Officers (IRO's) in TWA's commercial operations after age sixty. The Age 60 Rule does not apply to the flight engineer position (A-7); see *Criswell v. Western Air Lines, Inc.*, 709 F.2d 544, 546 (9th Cir. 1983); *Monroe v. United Air Lines, Inc.*, 27 Empl.Prac.Dec. [CCH] ¶32,230 (N.D. Ill. 1981).

³ ALPA opposed TWA's action and filed its lawsuit the same day the bulletin was issued (A-32; P.6).

define "flight engineer status," nor did it advise crewmembers approaching sixty how they could obtain that status (A-9).⁴ Under the terms of this policy, Captains and First Officers were required to bid on and be awarded flight engineer vacancies with "effective dates" prior to their sixtieth birthdays. Those who failed to do so were mandatorily retired and their names were removed from the seniority list at sixty (A-9 to A-10).⁵

TWA, at ALPA's encouragement, subsequently imposed two additional restrictions on downbidding Captains (A-11, A-32 to A-33). One rule required successful Captain downbidders to "fulfill their bids in a timely manner" (A-11). Initially, Captains who bid successfully for flight engineer vacancies were allowed to fly as Captains until age 60 and were later scheduled for flight engineer training. Under later practice, however, Captains who had been

⁴ TWA thereafter reinstated only those crewmembers who it considered to have been in flight engineer "status" at the time of sixtieth birthdays occurring after April 6, 1978 (A-9). Respondent Thurston, who was forced to retire from his Captain position on June 11, 1978 despite his request to remain employed, was not recalled (A-10; J.A. 909-10, 647).

⁵ Respondent Parkhill filed a bid for a flight engineer vacancy with an effective date of September 1, 1978. TWA refused to honor his bid because the effective date fell ten days after his sixtieth birthday. (J.A. 916-18).

Respondent Clark was retired on his sixtieth birthday, September 19, 1978. He wrote to TWA in July 1978 requesting continued employment after 60 (J.A. 929). On August 3, TWA responded that, for the time being, Clark's request would be denied. The letter went on to state that "should our policies ultimately be such that they would have permitted you to continue to work after attaining age sixty, you will be reinstated effective on your sixtieth birthday, with the pay and benefits then applicable to flight engineers who continue to work after age sixty" (J.A. 648). Despite this explicit promise, upon which Clark relied (J.A. 919, 922-24), TWA did not employ him after his sixtieth birthday.

awarded flight engineer bids were required to complete training and begin working as flight engineers before reaching age sixty (A-11).⁶ Similarly, TWA previously placed successful downbidders on off-duty-without-pay status after their sixtieth birthdays until they passed the written examination required by the FAA for entry into flight engineer training. As of January 1980, however, TWA permanently cancelled the bids of Captains who could not prove that they had passed the flight engineer examination when reporting for training (A-12).

These severe restrictions on sixty-year-old TWA crewmembers contrast sharply with the airline's treatment of younger crewmembers who are disqualified from their positions for any reason. The TWA-ALPA collective bargaining agreement permits these crewmembers to retain their employment and to transfer without bidding, vacancies, or interrupting their employee status. The Second Circuit found that

those who are unable to maintain a first class medical certificate but are still medically qualified to become flight engineers may automatically displace or "bump" a less senior flight engineer without being required to bid for the downgraded position. If the captain or first officer lacks sufficient seniority to displace, he is not discharged; rather, he is entitled to go on unpaid medical leave for up to five years.

Similarly, the Working Agreement provides that a pilot whose position is eliminated at a domicile due to reductions in force may use his seniority to displace a less senior pilot in any status at his current or last former domicile, or in his current status any-

⁶ This practice resulted in a loss of pay and responsibility during a period the crewmember could have been employed as a Captain (A-10; A-11 to A-12).

where in TWA's system.⁷ Like his medically disabled counterpart, the jobless pilot who lacks sufficient seniority to displace is not discharged. Rather, he is placed on furlough status which may extend for up to 10 years during which time he continues to accrue seniority for purposes of a recall.⁸

In addition, TWA, as a disciplinary measure in response to demonstrated incompetence, has not discharged incompetent pilots but has permanently transferred them to lower positions (such as that of flight engineer) for which they are qualified, without requiring the pilot to bid for a vacancy. This practice apparently routinely occurs without contractual provision.

(A-10 to A-11). Moreover, a pilot who fails training for upgrading from flight engineer to First Officer or from First Officer to Captain is assigned permanently to flight engineer status at his domicile (J.A. 250, 265-66). This occurs regardless of whether or not a flight engineer vacancy exists there at that time (J.A. 930, 941-45).

The Second Circuit relied on this explicitly age-based differential in treatment in finding for the *Thurston* respondents. After reciting the now-familiar *prima facie* case formula first enunciated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the court held:

⁷ A pilot who fails to submit a bid expressing his preference among these alternatives is automatically displaced to the next lower status his seniority permits, or to reserve status at his permanent domicile (J.A. 250, 311).

⁸ TWA and ALPA have entered into a "furlough aversion" agreement reducing the hours worked by all pilots in order to avoid a furlough of crewmembers rendered surplus due to cutbacks in TWA's operations (J.A. 930, 939-40).

A plaintiff is not barred by the *McDonnell Douglas* method from making out a prima facie case of age discrimination by alternative means, such as *direct* proof that an employer discriminates on the basis of age. *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914, 921 (2d Cir. 1981); see also *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 & n.18 (1st Cir. 1979).

Plaintiffs in the present case took advantage of this alternative method of making out a prima facie case. Their evidence revealed that TWA grants the downgrading requests of all pilots with sufficient seniority except those of captains and first officers who reach age 60. This direct evidence of a differentiation based solely on age is sufficient to give rise to an inference of discriminatory motive, see *Geller v. Markham*, [635 F.2d 1027, 1031 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981)] and establishes, therefore, a prima facie case of discriminatory treatment. See *Stanojev, supra*, 643 F.2d at 921; *Stone v. Western Air Lines, Inc.*, 544 F.Supp. 33, 37 (C.D. Cal. 1982).

(A-24, footnote omitted).⁹ After reviewing TWA's and ALPA's asserted justifications, the court concluded that "because TWA routinely accommodates other employees who seek to downgrade to flight engineer for non-age reasons and has failed to come forward with a permissible reason for its refusal to accord the same treatment to age-60 captains and first officers, the *Thurston* litigants and the EEOC claimants must prevail on their ADEA claim" (A-31, footnote omitted).

⁹ TWA's suggestion to the contrary notwithstanding (P.12n), the result is in accord with this Court's decision in *Teamsters v. United States*, 431 U.S. 324 (1977), which states that in a disparate treatment case, "[p]roof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." 431 U.S. at 335 n.15.

REASONS THE WRIT SHOULD NOT BE GRANTED

I. THERE IS NO MATERIAL CONFLICT AMONG THE CIRCUITS AS TO THE STANDARD FOR DETERMINING "WILLFUL" VIOLATIONS OF THE ADEA.

The Second Circuit's determination that TWA willfully engaged in age discrimination represents no departure from established precedent. The court, following its earlier opinion in *Goodman v. Heublein, Inc.*, 645 F.2d 127, 131 (2d Cir. 1981), held that in a disparate treatment case, "it is sufficient to establish that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA" (A-33). The Circuits, moreover, do not differ materially in their interpretation of "willfulness." To the extent that there is semantic variation, none of the formulas approved by the courts would lead to a different result here.¹⁰

TWA incorrectly argues that the Second Circuit's willfulness test is inconsistent with that adopted by the First and Seventh Circuits. *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979); *Syvock v. Milwaukee Boiler Manufacturing Co.*, 665 F.2d 149 (7th Cir. 1981).

The Seventh Circuit's opinion in *Syvock* is in accord with the result reached by the Second Circuit. The *Syvock*

¹⁰ Although TWA asserts otherwise (P.9), the willfulness issue was briefed in the Court of Appeals. The *Thurston* respondents requested the Second Circuit to follow its precedent in *Goodman* (Brief for Plaintiffs-Appellants dated January 14, 1983, p. 29n.). TWA asked for a remand on the willfulness issue "in the unlikely event" that it became relevant (Brief for Defendant-Appellee dated February 7, 1983, p. 19n.).

court held that to prove willfulness, a plaintiff must show that "the defendant's actions were knowing and voluntary and that he knew or reasonably should have known that those actions violated the ADEA." 665 F.2d at 156.¹¹ Furthermore, the *Syvock* court stated that its willfulness test was consistent with the test endorsed by the Second Circuit in *Goodman*, and with the *Goodman* court's interpretation of *Wehr v. Burroughs Corp.*, 619 F.2d 276 (3d Cir. 1980). *Syvock*, 665 F.2d at 155 n.9.

There also is no conflict between the Second Circuit's opinion and the decision of the First Circuit in *Loeb*, because the *Loeb* court did not specifically construe "willfulness" in the context of the ADEA. Rather, it was presented with the issue whether the "good faith" provision of the Portal-to-Portal Act, 29 U.S.C. §260, is incorporated into the ADEA. *Loeb*, 600 F.2d at 1020. *Loeb*'s passing mention of willfulness merely quotes a jury instruction treatise that does not specifically pertain to the ADEA. 600 F.2d at 1020 n.27. In fact, the quoted material refers to liability for criminal conduct. The standard for establishing willfulness, however, is less stringent in civil statutes such as the ADEA. *Wehr*, *supra*, 619 F.2d at 282; *see*

¹¹ The second aspect of the formula requires the plaintiff to show that (1) the employer knew or reasonably should have known the ADEA's requirements, and (2) the employer knew or reasonably should have known that his actions towards plaintiff were inconsistent with those requirements. The Seventh Circuit noted that the first part of this test will be easy to meet and that, as to the second, "the showing must be sufficient to indicate that the defendant's discrimination was not unconscious." 665 F.2d at 156 n.10. In other words, the action must be the result of a deliberate desire to remove older employees, rather than the unconscious application of stereotypes about older persons. 665 F.2d at 155. The *Thurston* respondents clearly have satisfied all of these requirements.

Kelly v. American Standard, Inc., 640 F.2d 974, 980 (9th Cir. 1981). There simply is no conflict among the Circuits that would warrant this Court's intervention.¹² *See Sup. Ct.R.* 17.1(a).

Finally, the willfulness finding must be considered in light of the particular facts of this case, which are exceptionally strong. TWA admittedly reviewed its age sixty practices in response to the 1978 ADEA amendments and concluded that it was required to employ flight engineers over sixty (A-4, A-34; P.5-6). Despite this determination, the company proceeded to impose a series of restrictions designed to limit post-sixty employment to the greatest possible extent.¹³ Thus, whatever definition of willfulness

¹² TWA suggests (P. 11) that the Third, Sixth, and Ninth Circuits have staked out yet a third position on the willfulness issue. The Sixth Circuit, however, has concurred in the reasoning of *Syvock*. *Blackwell v. Sun Electric Co.*, 696 F.2d 1176, 1184 n.12 (6th Cir. 1983). The *Syvock* court, in turn, agrees with the Third and Ninth Circuits. *See Orzel v. City of Wauwatosa*, 697 F.2d 743, 757 n.28 (7th Cir.), *cert. denied*, 104 S.Ct. 484 (1983) (*Syvock* expressed approval of *Kelly* and *Wehr*).

TWA also relies on two opinions from the Southern District of New York (P. 11n-12n). The Court of Appeals cited one of these decisions in its discussion of "willfulness" (A-33), and thus was aware of its existence. To the extent that these opinions depart from *Goodman*, they simply do not represent the law of the Second Circuit.

¹³ TWA boasts of an 83% "success rate" among Captains seeking transfers at age 60 (P. 10n, 18n, 20). That figure, however, does not take into account the numerous pilots who decided not to seek flight engineer transfers because of the financial and other costs. *See* A-11 to A-12. Furthermore, as this Court has held in cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, that statute "does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired. . . . Every individual employee is protected against . . . discriminatory treatment. . . ." *Connecticut v. Teal*, 457 U.S. 440, 455 (1982);

(Footnote continued on following page)

is applied to TWA's conduct, the ultimate conclusion will be the same. In view of the well-established principle that appellate courts should decline to review issues that are not necessary to the result, *Highland Supply Corp. v. Reynolds Metals Co.*, 327 F.2d 725, 729 (8th Cir. 1964), certiorari should not be granted on this question.

II. THE ISSUE OF ALPA'S LIABILITY FOR BACK PAY IS NOT APPROPRIATE FOR CONSIDERATION AT THIS TIME.

The *Thurston* respondents agree with TWA that a labor organization found to have violated the ADEA should be held liable for back pay and other relief on the same terms as an employer. This issue, however, is appropriately raised by the individuals who have been aggrieved. The *Thurston* respondents will now receive full relief from TWA under the Court of Appeals decision.¹⁴ As they have no need at this stage to have the issue litigated further, the Court should decline to grant TWA's Petition on this issue.¹⁵

¹³ continued

Furnco Construction Corp. v. Waters, 438 U.S. 567, 579 (1978). See A-25; *Lorillard v. Pons*, 434 U.S. 575, 584 (1978) (ADEA substantive provisions were derived in *haec verba* from Title VII).

¹⁴ The *Thurston* respondents could have brought the action against TWA alone. See *Criswell*, *supra*, 709 F.2d at 557 (ALPA not a necessary party to age 60 action); *EEOC v. Eastern Air Lines, Inc.*, 26 Empl.Prac.Dec. [CCH] ¶32,122 (5th Cir.), cert. denied, 454 U.S. 818 (1981) (union not indispensable party to ADEA action involving pension plan). Moreover, ADEA defendants are subject to joint and several liability. Cf. *Dunlop v. Beloit College*, 411 F.Supp. 398, 402 (W.D. Wis. 1976) (Equal Pay Act).

¹⁵ In the event that the Court grants certiorari on this issue, the *Thurston* respondents reserve all rights with regard to their claim for monetary relief from ALPA. See J.A. 58, 62-66, 68.

Moreover, TWA has never sought, prior to filing its Petition in this Court, to have ALPA share liability for the actions that are the subject of this litigation.¹⁶ TWA's attempt to shift the blame to ALPA for the first time in a Petition to this Court must be viewed as a vehicle for delay.¹⁷ Cf. *Tennessee v. Dunlap*, 426 U.S. 312, 316 n.3 (1976) (assertion not pleaded in the complaint and not considered by the District Court or Court of Appeals is not before this Court).

III. THE SECOND CIRCUIT'S DECISION IS FULLY IN ACCORD WITH OTHER DECISIONS INVOLVING DISCRIMINATORY TREATMENT BECAUSE OF AGE.

TWA's third issue is nothing more than a request that this Court re-evaluate uncontroverted direct evidence of discriminatory treatment because of age. The decision below represents no departure from established case law, and creates no new pitfalls for employers.

The court found that TWA permits downgrading by all pilots *except* those approaching sixty, "a differentiation based solely on age" (A-24).¹⁸ The court also took note

¹⁶ ALPA filed a cross-claim against TWA in the *Thurston* action, alleging that the airline was solely responsible for the actions taken with regard to respondents. TWA, in response, merely denied ALPA's allegations. See J.A. 103, 105; 91.

¹⁷ TWA, in effect, is seeking contribution from ALPA, a remedy to which it may not be entitled. Cf. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 91-92 (1981) (employer has no implied right of action for contribution from union for Equal Pay Act liability, as that statute was not enacted for employers' especial benefit).

¹⁸ TWA's statement that it treated all crewmembers "equally" (P. 20) is flatly contrary to undisputed evidence that it imposed extra-contractual rules on sixty-year-olds alone (see A-9 to A-12; A-26).

of TWA's "conscious refusal" to relocate or retrain Captains and First Officers at sixty while doing so for all younger crewmembers (A-30).¹⁹ The decision merely reaffirms the ADEA's mandate of equal treatment irrespective of age (A-29 to A-30); it does not grant preferential treatment to older workers merely because of their age.

The decision also is consistent with the "age as a determining factor" test that has been adopted by eleven Circuits.²⁰ Under this formulation, an ADEA plaintiff bears the burden of proving that age was a determining factor, i.e., one that "made a difference" in the challenged employment decision. The *Thurston* respondents not only met, but exceeded that test. The Second Circuit found that age was not merely "a" factor, but was the sole reason for TWA's actions towards respondents (A-24, A-31). Cf. *Parcinski v. Outlet Co.*, 673 F.2d 34, 36 (2d Cir. 1982), cert. denied, 103 S.Ct. 725 (1983) (ADEA plaintiff is not required to prove that age was the exclusive reason for the employment decision).

¹⁹ As authority, the court cited *Williams v. General Motors Corp.*, 656 F.2d 120 (5th Cir. 1981), cert. denied, 455 U.S. 943 (1982), which TWA claims is contrary to the decision in this case (P. 19).

²⁰ *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979); *Geller v. Markham*, 635 F.2d 1027, 1035 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981); *Smithers v. Bailar*, 629 F.2d 892, 896-97 (3d Cir. 1980); *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1112 (4th Cir.), cert. denied, 454 U.S. 860 (1981); *Carter v. Maloney Trucking & Storage, Inc.*, 631 F.2d 40, 42 (5th Cir. 1980); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 317 (6th Cir. 1975); *Golomb v. Prudential Insurance Co. of America*, 688 F.2d 547, 550-51 (7th Cir. 1982); *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958, 960 (8th Cir. 1978); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 984-85 (9th Cir. 1981); *Anderson v. Savage Labs*, 675 F.2d 1221, 1224 (11th Cir. 1982); *Cuddy v. Carmen*, 694 F.2d 853, 856-57 (D.C. Cir. 1982).

The *Thurston* respondents do not claim any special "entitlement" or "new right" "simply because of age" (P. 18, 19). Instead, "they merely seek the same treatment accorded all younger captains and first officers who become unable to serve in their former capacities for non-age reasons. There is nothing 'special' or 'preferential' about equal treatment" (A-29 to A-30).²¹

The Second Circuit's opinion follows from well-established ADEA principles and does not create any additional employee rights or employer burdens. The decision raises no new issues whatsoever, much less any that are worthy of this Court's consideration.²²

²¹ TWA ultimately returns to the fallacious argument which formed the basis of its position below (P. 20n). The fact that crewmembers cannot "serve" as Captains after sixty, see 14 C.F.R. §121.383(c), does not mandate their severance from the seniority list. The Second Circuit saw through this smokescreen (A-25 to A-26), as have the other courts that have considered this issue. *Stone v. Western Air Lines, Inc.*, 544 F.Supp. 33, 37 (C.D. Cal. 1982); *Johnson v. American Airlines, Inc.*, 31 Empl.Prac.Dec. [CCH] ¶33,417 (N.D. Tex. 1983); *Monroe v. United Air Lines, Inc.*, 27 Empl.Prac.Dec. [CCH] ¶32,230 (N.D. Ill. 1981).

²² As of this time, there is simply no need for the Court to examine the industrywide age sixty flight engineer controversy (see P. 17n). The only other appellate decision rendered in this issue is totally consistent with that of the Second Circuit, *Criswell v. Western Air Lines, Inc.*, 709 F.2d 544 (9th Cir. 1983), rehearing denied, December 20, 1983, and appeals are pending in two other cases. *Monroe v. United Air Lines, Inc.*, Nos. 83-1245 et al. (7th Cir.) and *Johnson v. American Airlines, Inc.*, No. 83-1610 (5th Cir.). Six air carriers have entered into consent decrees on this issue.

TWA's desire to have this Court establish guidelines for the airline industry (P. 18n) is somewhat ironic since in 1979, TWA vigorously (and successfully) opposed plaintiffs' efforts to consolidate twelve ADEA Age 60 cases for pretrial proceedings on the basis that factual issues and defenses were different for each airline. See *In re Airline "Age of Employee" Employment Practices Litigation*, 483 F.Supp. 814 (J.P.M.D.L. 1980).

CONCLUSION

For the foregoing reasons, the *Thurston* respondents respectfully request that certiorari be denied.

Respectfully submitted,

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**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF AMICUS CURIAE OF THE CHAMBER OF
COMMERCE OF THE UNITED STATES OF AMERICA
IN SUPPORT OF THE PETITION FOR CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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Chamber of Commerce of the
United States*

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-997

TRANS WORLD AIRLINES, INC.,
Petitioner.

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A.
PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COM-
MISSION AND AIR LINE PILOTS ASSOCIATION, INTERNA-
TIONAL,

Respondents.

**MOTION OF THE CHAMBER OF COMMERCE OF THE
UNITED STATES FOR LEAVE TO FILE
BRIEF AMICUS CURIAE IN SUPPORT OF THE
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

The Chamber of Commerce of the United States hereby moves for leave to file the attached brief *amicus curiae* in support of the petition for certiorari in this case pursuant to Supreme Court Rule 36.1. This motion is necessitated by the refusal of the individual respondents to consent to the filing of the brief. The petitioner and the respondents, Equal Employment Opportunity Commission and Air Line Pilots Association, have consented to the filing.¹

¹ Copies of the consent letters are being filed simultaneously with the attached brief. Counsel for the Air Line Pilots Association has orally consented to the filing.

This case arose out of the Federal Aviation Administration's requirement that commercial airline pilots retire at age 60. 14 C.F.R. § 121.383(c). The issues presented by this case are fundamental to the application of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 (1982). Those issues are whether specific intent is necessary to establish a "willful" violation of the ADEA; whether a labor union which has been found to have violated the ADEA is immune from liability for back pay; and what age-related accommodations an employer must make for employees when it makes non-age-related accommodations.

Receiving guidance on complying with the ADEA is of crucial importance to the business community. It is well established that the percentage of the American workforce within the ADEA's protected class (ages 40-70) is constantly growing.² It is thus likely that the number of cases filed under ADEA will grow as well.

As the largest federation of business organizations and individuals in the United States and the principal spokesman for the American business community, the Chamber of Commerce of the United States ("Chamber") is well-suited to present the broad interest of business in this case. The Chamber's current membership exceeds 200,000, including over 195,000 corporations, partnerships and proprietorships, as well as over 3,900 trade associations, and local and state chambers. As one of its principal functions, the Chamber regularly presents its views before this Court, as well as the lower federal courts.³

² See Monison, "The Aging of the U.S. Population; Human Resource Implications", BNA Daily Labor Reporter No. 112, p. F-1 (June 9, 1983).

³ See, e.g., *Bowen v. U.S. Postal Service*, — U.S. —, 74 L. Ed. 2d 402 (1983); *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981); *Amoco Production Co. v. NLRB*, 613 F.2d 107 (5th Cir. 1980).

The Chamber believes it is important for this Court to recognize the business community's need for guidance on the issues noted above. It is for this reason that the Chamber respectfully requests leave to file the attached brief.

Respectfully submitted,

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 COMMERCE OF THE UNITED STATES OF AMERICA
 IN SUPPORT OF THE PETITION FOR CERTIORARI
 TO THE UNITED STATES COURT OF APPEALS
 FOR THE SECOND CIRCUIT**

STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") respectfully refers this Court to its Motion for Leave to File Brief Amicus Curiae for a statement of the Chamber's interest in this proceeding.

I. CONFLICTING OPINIONS OF WHAT CONSTITUTES A WILLFUL VIOLATION OF THE ADEA FAIL TO PROVIDE A CLEAR UNDERSTANDING OF THE SCOPE OF THE ADEA.

A. A Single Standard For Determining A Willful Violation Of The ADEA Will Ensure Consistent Results For All Employers Subject To The ADEA.

Willful violations of the Age Discrimination in Employment Act ("ADEA") can provide a basis for plaintiffs alleging age discrimination under the ADEA to obtain double damages from their employers. 29 U.S.C. § 626(b) (1982). The issue of what constitutes a willful violation of the ADEA is thus of vital concern to virtually all employers in the United States, especially those who may be forced to lay off employees in times of economic hardship. Economic decisions to upgrade technology or to discontinue outdated methods of manufacturing also may adversely affect older workers with more traditional training. Compliance standards under the ADEA are particularly important to multi-jurisdictional employers although they remain troublesome to owners of small businesses as well.

Multi-jurisdictional employers who unwittingly violate the ADEA may find their actions subject to at least four different standards currently used by the Courts of Appeals to determine willful violations of the ADEA. Small business owners who think of willful actions in terms of dictionary definitions are equally confused by the complex, multiple legal tests presently used to determine willful violations of the ADEA.

The Chamber is concerned about this disagreement in the circuits and the confusion it causes in the business world. Guidance from this Court is imperative in order to provide both employers and the lower courts with a fixed understanding of what standards should control

claims of willful violations of the ADEA. Action by this Court to establish a single standard for determining willfulness would allow all courts to follow a uniform guideline when deciding claims for double damages. Beside giving employers an understanding currently absent from the law, uniformity would ensure that problems regarding the definition of willfulness would not recur in the courts each time an employee files a claim for double damages.

B. The Standard Of Willfulness Adopted By The Majority Below Is Unfair And Conflicts With At Least Three Other Courts of Appeals.

Section 7(b) of the ADEA, a provision unusual among discrimination laws, authorizes the recovery of liquidated damages "*only* in cases of *willful* violations" of the Act. (29 U.S.C. § 626(b)) (emphasis added). Liquidated damages are clearly defined as an amount equal to the lost wages resulting from the violation—in other words, double damages. 29 U.S.C. § 216(b) (incorporated by reference in 29 U.S.C. § 626(b)). The definition of "willful", however, is less than clear. Congress did not define the term and the legislative history sheds no light on what was intended. The absence of congressional guidance coupled with open disagreement among the federal courts have wreaked havoc in the circuits.

At least four different standards for determining a willful violation have emerged from the courts of appeals. The lower courts most strongly differ on whether specific intent to violate the ADEA is required before liquidated damages may be imposed.

According to the standard adopted by the majority below, an employer may be liable for double damages even though he did not know his actions were illegal. Thus, in the Second Circuit "plaintiffs need not prove a specific intent to violate the ADEA; it is sufficient to establish that the employer either knew or showed reckless disregard for the matter of whether its conduct was pro-

hibited by the ADEA." (A-33). The Chamber respectfully submits that this standard is unfair, and conflicts with at least three other courts of appeals.

By deciding that proof of specific intent to violate the ADEA is not necessary to show "willfulness", the majority below expressly contradicts the principle established by the First Circuit in *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1979). In that case, the First Circuit defines a violation of the ADEA as willful if "done voluntarily and intentionally and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law. *Loeb*, 600 F.2d at 1020 n.27, quoting E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 14.06, at 384 (3d ed. 1977). The majority below, on the other hand, does not look at the purpose of an employer's action to determine whether it was willful.

Instead, the majority leaps to the specious conclusion that "'an employer's action, if taken *because* of an impermissible factor such as age, cannot be the result of negligence, mistake, or other innocent reason.'" (A-34) (emphasis in the original). Originally articulated by the Third Circuit in *Wehr v. Burroughs Corporation*, 619 F.2d 276 (3d Cir. 1980), this lower standard for determining willfulness allows a recovery of double damages if an employee can prove either that an employer's action was "voluntary and not accidental, mistaken, or inadvertent" or "precipitated in reckless disregard of the consequences. *Wehr*, 619 F.2d at 283. This test ignores the plain meaning of "willful" and defeats congressional intent to establish a two-tiered level of liability under the ADEA.

The fact that Congress provided for special remedies in the case of a willful violation implies that employees can recover for accidental and unintentional violations as well as for deliberate violations of the ADEA. The difference in recovery would be between liquidated damages

for willful violations and actual damages for non-willful violations. Yet, under the standard applied by the majority below, there can be no unintentional or innocent reason for an employer's action if taken because of age. Such a finding necessarily follows in every ADEA disparate treatment case. By failing to distinguish willful from non-willful conduct, the Second Circuit ignores congressional intent.

In *Syvock v. Milwaukee Boiler Manufacturing Company*, 665 F.2d 149, 155 (1981), the Seventh Circuit combines portions of the First Circuit's specific intent test ("[T]he standard of willfulness . . . should focus on the defendant's state of mind at the time the alleged discriminatory act occurred") with an entirely new formula for determining a willful violation of the ADEA. Thus, the *Syvock* court finds willfulness "only if there is some showing as to . . . knowledge of . . . illegality," and holds an employer liable for double damages if his actions are "knowing and voluntary and . . . he knew or reasonably should have known that those actions violated the ADEA." *Syvock*, 665 F.2d at 155-156. This standard defers to the statute's two-tiered level of liability and, thereby, avoids automatic imposition of double damages under the ADEA.

The Ninth Circuit also is selective in defining a willful violation of the ADEA. Adding to the uncertainty surrounding the meaning of willfulness, the court in *Kelly v. American Standard, Inc.*, 640 F.2d 974 (1981) adopts the "knowing and voluntary" standard established in *Wehr*, but expressly rejects the "reckless disregard" portion of the Third Circuit's definition. ("We decline to extend the punitive provision of double recovery beyond knowing violations." *Kelly*, 640 F.2d at 980 n.7).

C. A Single Standard Would Eliminate This Erratic Approach To Defining Willfulness And Avoid Confusing Litigation Over Claims For Double Damages.

The conflict in the circuits outlined above demonstrates an erratic approach to defining a willful violation of the

ADEA that utterly fails to provide employers and courts with a workable degree of guidance. The test adopted by the majority below does not adequately distinguish willful from non-willful violations of the ADEA and imposes automatic double damages even on employers who in good faith believe they are complying with the Act.

The Chamber urges this Court to put an end to this continuing conflict by establishing a single standard for determining willfulness that adequately protects well-meaning and conscientious employers from arbitrary imposition of double damages. The Chamber believes that employers will have fair and adequate protection from claims of willful violations were this Court to adopt a specific intent standard similar to the one established in the First and Seventh Circuits. Such a standard would avoid multiplicity of litigation over the question of whether an employer's actions were willful. A single standard would respond to the business community's need for guidance and reduce the frequency of litigation over this issue.

II. THIS COURT SHOULD RESOLVE THE CRITICAL QUESTION OF WHETHER UNIONS THAT HAVE VIOLATED THE ADEA CAN BE HELD LIABLE FOR BACK PAY.

A. Rapid Resolution Of This Significant ADEA Issue Will Avoid Unnecessarily Burdening Employers, Unions And The Lower Courts.

The initial opinion of the U.S. Court of Appeals for the Second Circuit held that the plaintiffs in this action could recover back pay from the union (*Air Line Pilots Association*), as well as from the employer. In this regard, the court originally held:

[Plaintiffs] are entitled to recover back pay, an equitable remedy, against the union. *Equal Employment Opportunity Commission v. Air Line Pilots Association, Int'l*, 489 F. Supp. 1003, 1008-10 (D. Minn. 1980) *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981). The union owes a duty to all its

members, including its over-60 members, not to discriminate against them. See, *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944). One of the purposes of a back pay award is to spur unions, as well as employers, to evaluate employment practices and eliminate unlawful discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975).

A-34-35.⁴

Although petitions for rehearing were denied, the Second Circuit subsequently deleted those portions of its opinion where it imposed back pay liability on the union. (A-38-39). The Second Circuit provided absolutely no rationale for its action. Thus lower courts, as well as parties subject to the ADEA receive no guidance from the Second Circuit's opinion on whether unions must share monetary liability with employers.

It is for this reason that the Chamber strongly urges this Court to grant the instant petition. The question of union liability for back pay is one that will be repeatedly litigated unless this Court steps in to quickly resolve the issue. It is a straight-forward question of law suitable for review by this Court. The only other courts that have addressed the issue have reached differing results. Compare *Equal Employment Opportunity Commission v. Air Line Pilots Association*, 489 F. Supp. 1003, 1009 (D. Minn. 1980), *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981) (holding that unions as well as employers are

⁴ See A-20-21 and A-31-33 for a discussion of what the Second Circuit viewed as the union's clear culpability here. For example, the majority below specifically held that the union sought "to use the ADEA to cut off the rights of the older flight engineers." (A-20). The court also said that the union "actively campaigned to persuade TWA to retain its age-60 retirement policy for all flight deck positions, opposed TWA's unilateral action to attempt partial compliance with the ADEA and induced TWA to impose further discriminatory restrictions on captains seeking to downbid to flight engineer status . . ." (A-32-33).

liable under the ADEA for back pay) with *Neuman v. Northwest Airlines*, 38 FEP 1488, 1491 (N.D. Ill. 1982). We believe this portends continuing conflict in the lower courts. Quick resolution will, therefore, avoid needless litigation expenses on the part of all parties, as well as reduce litigation burdens on the lower courts.⁵

B. Congressional Intent To Subject Unions To The ADEA Will Be Emasculated If Unions Do Not Share In The Monetary Liability.

It is clear that the ADEA applies equally to employers and unions. Section 4(c) of the statute, 29 U.S.C. § 623, makes it illegal for a union to take any action which adversely affects an employee because of his or her age. It begs credulity to assume that Congress did not intend this provision to have any "teeth". Yet that is apparently the assumption made by the Second Circuit.

Statements of Congressmen during consideration of the 1978 amendments indicate strong concern that unions bear their part of the burden of compliance with the ADEA. For example, Congressman Findley stated:

The AFL-CIO wants union leadership to keep mandatory retirement as an issue for negotiation during collective bargaining. Union leaders argue that because they represent a majority of the workers, mandatory retirement would therefore be a majority decision. But a majority should never be permitted to impose injustice on even a small minority. Unions cannot bargain away the rights of blacks or women—why older citizens?

123 Cong. Rec. H 9348 (daily ed. Sept. 13, 1977).

⁵ As we noted in our motion for leave to file this brief, ADEA litigation is likely to be one of the "growth" areas of employment related litigation. Motion of the Chamber of Commerce for Leave to File Brief Amicus Curiae, p. 2.

And, Congressman Hillis expressed agreement with an article he inserted in the hearing record from the newsletter of the American Association of Retired Persons which states in pertinent part:

Myth: Unions should have the right to use a mandatory retirement age as a "bargaining chip" in collective bargaining with management.

Reality: Unions are prohibited from discrimination on the basis of race, religion or sex in collective bargaining. Why should they be allowed to practice age discrimination by bargaining away a person's opportunity to earn a livelihood merely because of age? In recent months several unions—including the United Steelworkers of America—have made important strides toward flexible retirement policies for their members. We hope that their colleagues in organized labor will see the wisdom of this approach.

123 Cong. Rec. H 9970 (daily ed. Sept. 23, 1977).

As we previously stated, it is incomprehensible that Congress would express this type of concern over union compliance with the ADEA, but not intend union liability for losses caused by its noncompliance. Cf. *EEOC v. ALPA*, 489 F. Supp. at 1009. As recently as last term, this Court recognized that if unions are not made to share in the monetary liability resulting from their illegal acts they will have little motivation to comply with their statutory responsibilities. *Bowen v. U.S. Postal Service*, — U.S. —, 74 L. Ed. 2d at 416. In *Bowen*, a fair representation case, this Court stated:

In the absence of damages apportionment where the default of both parties contributed to the employee's injury, incentives to comply with the grievance procedure will be diminished.⁶

⁶ *Bowen* was a refinement of this Court's holding in *Vaca v. Sipes*, 386 U.S. 171, 197 (1967) that the "governing principle . . . is to apportion liability between the employer and the union according to the damage caused by the fault of each."

Back pay awards against unions have also been consistently imposed under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 141 (1972). For example, unions which violate § 8(b)(2) of the NLRA by causing an employer to discriminate against employees by encouraging or discouraging union membership have been held by the National Labor Relations Board to be entirely liable for the back pay when it was necessary to do so in order to make the injured employees whole. (29 U.S.C. § 158(b)(2)). In *Radio Officers' Union v. NLRB*, 347 U.S. 17, 54-55 (1953), this Court emphatically rejected the argument that it would not effectuate NLRA policies to require the union "to reimburse back pay if the employer is not made to share this burden. . . ."

Imposition of monetary liability on the unions under the ADEA is also consistent with the practice under what can be viewed as its "sister statute", Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1981). Courts uniformly have held under Title VII that unions must share monetary liability with employers.⁷ The same result should obtain under the ADEA.

For these reasons, the Chamber believes that imposition of back pay liability is consistent with the ADEA, other labor statutes, and our national labor policy. Moreover, there is no inequity in imposing monetary liability on a party found to be directly responsible for a statutory violation where (1) the statute expressly imposes a duty to comply, and where (2) the statute provides that the court may "grant such legal or equitable relief as may be

⁷ See, e.g., *Sears v. Atkinson, Topeka, and Santa Fe Railway*, 645 F.2d 1365, 1374-77 (10th Cir. 1981), cert. denied sub nom. *UTU v. Sears*, 456 U.S. 964 (1982); *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1300 (8th Cir. 1978); *Allen v. Amalgamated Transit Union, Local 788*, 554 F.2d 876, 881 (8th Cir.), cert. denied, 434 U.S. 891 (1977); *Rogers v. International Paper Co.*, 526 F.2d 722, 723 (8th Cir. 1975). See also, Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702, 706 (1980).

appropriate to effectuate the purposes of this Act. . . ." 29 U.S.C. § 626(b). Accordingly, this Court should grant the instant petition.

III. THIS COURT SHOULD RESOLVE THE QUESTION OF AN EMPLOYER'S OBLIGATION TO ACCOMMODATE EMPLOYEES FOR AGE-RELATED REASONS WHEN NON-AGE RELATED ACCOMMODATIONS ARE PROVIDED ON A NON-DISCRIMINATORY BASIS.

A majority of the court below reversed the District Court's dismissal of the case and held that Trans World Airlines (TWA) had violated the ADEA by requiring that pilots approaching age 60 bid for positions as flight engineers prior to their 60th birthdays, and retire if no position was available. The Second Circuit's holding is based on the fact that TWA routinely accommodated pilots downgrading for reasons other than having reached the Federal Aviation Administration's ("FAA") mandatory retirement age.

The Chamber is greatly concerned about the Second Circuit's holding and its failure to define the extent of an employer's obligation to make non-age-related accommodations. This concern is heightened by the facts of this case which demonstrate that TWA's requirement was instituted as a response to an FAA regulation, that downgrading for reasons other than reaching age 60 was provided without regard to age, and that the vast majority of the pilots attempting to downgrade at age 60 were accommodated. The Chamber believes that the District Court's holding is far more rational under the circumstances. Judge Duffy held:

From these undisputed facts these plaintiffs and claimants cannot establish a *prima facie* case of discrimination solely because no job vacancy existed at the time they applied and were eligible for the job. TWA was legally obligated to remove these pilots at age 60 under the FAA regulations. TWA was

not obligated, however, to offer these ex-pilots jobs which did not exist. To the extent jobs existed, TWA was justified in relying upon a seniority bidding system. (Citation omitted)

(A-57)

The displeasure of the majority below with Judge Duffy's holding appears to stem from its dislike of the FAA's Age 60 Rule. This is obvious from the court's observation that the FAA does not apply the Age 60 Rule to its own pilots. (A-18). However, the net result of the appellate court's ruling is to compare two dissimilar situations, pilots downgrading for conditions such as medical problems and those downgrading because they are reaching age 60.

As Judge Van Graafeiland points out in dissent, "this is like comparing apples with oranges." (A-36) A truer comparison for purposes of establishing a case of disparate treatment would be one between two employees attempting to downgrade for medical reasons, one of whom was in the protected class, and one of whom was not. But no such claim of disparate treatment has been made here.

The Chamber believes that the holding of the Second Circuit may have wide-ranging ramifications if comparisons similar to those made by the Second Circuit are made in other factual settings. Accordingly, we urge this Court to grant the instant petition.

CONCLUSION

The Chamber of Commerce respectfully urges this Court to grant the petition for certiorari of Trans World Airlines.

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**BRIEF OF AIR LINE PILOTS ASSOCIATION,
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BRIEF OF AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL IN OPPOSITION TO PETITION FOR
A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

Air Line Pilots Association, Interna-
tional ("ALPA") submits this brief in op-
position to the petition for a writ of
certiorari as to the second question¹
presented by petitioner Trans World
Airlines, Inc. ("TWA").

QUESTIONS PRESENTED

1. Whether an employer, which has been
found to have jointly violated the Age
Discrimination in Employment Act ("ADEA")
with a labor organization, may shift a
portion of the damages recoverable under
Section 7(b) of the ADEA, 29 U.S.C.
§626(b), to that labor organization?

¹"Whether a labor union found to have
jointly violated the Age Discrimination
in Employment Act with an employer can
nonetheless be absolved as a matter of
law from any liability for back pay?"

2. Whether Congress, in its incorporation of Fair Labor Standards Act ("FLSA") remedies in Section 7(b) of the ADEA, 29 U.S.C. §626(b), provided for any monetary relief against a labor organization which has been found to have jointly violated the ADEA?

STATUTES INVOLVED

In its petition, TWA noted that Sections 4(a), (c), (f)(1), (f)(2), 7(b) and 12(a) of the ADEA, 29 U.S.C. §§623(a), (c), (f)(1), (f)(2), 626(b), and 631(a), were involved in this case. In addition, Sections 3(d), 6(d), 15(a)(2), (3), 16, and 17 of the Fair Labor Standards Act of 1938 ("FLSA") 29 U.S.C. §§203(d), 206(d), 215(a)(2), (3), 216 and 217 are set forth in Appendix "A".

STATEMENT OF THE CASE

TWA employs flight deck crew members in Captain, First Officer, International Relief Officer, and Flight Engineer status. Pursuant to the seniority system embodied in collective bargaining agreements ("Agreement") between TWA and ALPA, flight deck crew members may be awarded vacant positions in another status (i.e., a captain may bid for, and be awarded a flight engineer vacancy), or in limited circumstances may "bump" incumbents (i.e., a captain displaced in a reduction in force may bump an incumbent flight engineer with lesser seniority).

As enacted in 1967, the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621-634, expressly authorized involuntary

retirement pursuant to the terms of an existing bona fide employee benefit plan. United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977). Sections 4.1 and 4.2 of the TWA retirement plans ("Plan") have provided that all flight deck crew members "must retire" on their normal retirement date at age 60, "unless written approval of the Company is granted for continuance in employment." The Federal Aviation Administration Age 60 Rule, 14 C.F.R. §121.383(c), does not permit service as a "pilot" after age 60; the FAA does not consider a flight engineer to be a "pilot" within the meaning of 14 C.F.R. §121.383(c).

Effective April 6, 1978, Congress amended the ADEA to eliminate a bona fide employee benefit plan defense for mandatory retirement at an age less than 70. On

August 10, 1978, TWA adopted a policy which permitted all flight deck crew members in "flight engineer status" prior to age 60 to continue in employment past age 60. From 1950 to August 1978, TWA had not permitted any flight deck crew member to serve past age 60.

While TWA permitted flight deck crew members in "flight engineer status" to continue in employment, it terminated the seniority rights of those whom it considered not to be in that status at age 60. That critical distinction in the August 10, 1978 policy was a matter of unilateral decision by TWA. The seniority system embodied in the pilot Agreement does not contain any age-based limitation on the exercise of seniority rights, ALPA v. TWA, A-26; TWA management employees testified

(in depositions), without contradiction, that ALPA played no role in formulating that August 10, 1978 policy.²

TWA has justified its adoption of the August 10, 1978 policy, inter alia, on the grounds that §4.2 of the Plan expressly authorizes TWA to permit any flight deck crew member to serve past age 60. The TWA Pilot System Board of Adjustment,³ in an opinion by Neutral Harry T. Edwards, held that the August 10, 1978 "Policy was adopted unilaterally in an attempt to comply with the 1978 amendments to the ADEA[;] [i]t is clear, therefore, that the Policy was not contractually mandated."⁴

²Deposition of J. Hilly at 1051; J.E. Frankum at 203, 206. See ALPA Petition for Rehearing Br. at 14.

³The System Board is established, pursuant to the mandate of 45 U.S.C. §184, to resolve disputes concerning the interpretation or application of the Agreement.

⁴A copy of the Award, issued in 1979, and

In ALPA v. TWA, filed on August 10, 1978, ALPA challenged the new policy as a unilateral change in flight deck crew member working conditions, as embodied in the 1977 Agreement, in violation of Sections 2, Seventh and 6 of the Railway Labor Act, 45 U.S.C. §§152, Seventh and 156. In Thurston v. TWA, plaintiffs asserted that depriving captains disqualified by the FAA Age 60 Rule of seniority rights to transfer to flight engineer positions violated ADEA. TWA did not assert any cross-claim against ALPA, or otherwise claim that any injury allegedly caused to plaintiffs by TWA was a result of conduct by ALPA, in its answer to the Thurston amended complaint.

submitted by TWA as an Exhibit in support of its motions for summary judgment in the district court, is contained in Appendix "B".

The District Court entered summary judgment in favor of TWA and ALPA in Thurston. The Court of Appeals reversed that decision; even though plaintiffs had not moved for summary judgment below, and ALPA had informed the Court of the existence of disputed issues of material fact concerning alleged violations of §4(c) of ADEA, 29 U.S.C. §623(c), the Court of Appeals directed entry of judgment against ALPA and TWA. In its original decision of August 1, 1983, the Court held that while the ADEA did not provide any legal remedies against unions, an equitable backpay remedy should be implied. A-34-35. After consideration of ALPA's petition for rehearing, the Court corrected its decision to hold that the ADEA did not authorize any monetary remedies against ALPA. A-38.

The Court of Appeals found that ALPA had aided and abetted TWA's violation of ADEA by agreeing to incorporate §4.2 of the Plan in the 1979 Agreement; that, in 1980, ALPA had "caused" TWA to modify its 1978 policy adversely to plaintiffs;⁵ and that ALPA had

⁵The contractual seniority system both requires TWA to list an "effective date" for each vacancy, and permits TWA to adjust the effective date of the bids. After TWA implemented its August 10, 1978 policy, it unilaterally decided to allow captains awarded flight engineer bids with an "effective date" prior to their 60th birthdays to postpone commencement of service as a flight engineer until after age 60. While adjustments of effective dates, or even cancellation of bids, may be necessary for operational reasons, there is no evidence that TWA had previously allowed pilots' bidding for lower paying vacancies to postpone the effective date in order to minimize loss of pay.

Following a January, 1980 meeting, in which ALPA requested that TWA require all pilots to fulfill flight engineer bids in a timely manner, TWA implemented a new "timely manner" policy in 1980. The record is, at best, unclear concerning the causal nexus between the new policy and the January, 1980 meeting. The deposition testimony of a TWA official, which was the only evidence before the Second Circuit concerning the development of the policy,

attempted to cause TWA to violate the ADEA

states: "I can't say for sure whether or not it was the result of the meeting. It just so happens that our reading of the agreement coincided on that possibility." J.A. 1071.

Plaintiffs challenged this policy on the grounds that it caused captains who actually served as flight engineers to lose "pay and responsibility, in contrast to the 1979 situation when virtually all downbidders were permitted to complete their full careers as captains" (Appellants Br. at 18); they neither argued nor proved that age 60 captains received less favorable treatment in this regard than younger downbidding pilots. See, e.g., EEOC v. ALPA, 661 F.2d 90 (8th Cir. 1981). Plaintiffs did not claim that the "timely manner" policy resulted "in the cancellation of bids awarded three downbidding EEOC plaintiffs," ALPA v. TWA, A-32; indeed, only two plaintiffs reached age 60 after January 1980 (H.W. Lewis, 11/24/80; D.V. Roquemore, 8/21/81). Notwithstanding, this record, the Second Circuit concluded that:

The evidence is undisputed that ALPA caused TWA to institute the requirements that successful downbidders 'fulfill their bids in a timely manner,' resulting in the cancellation of bids awarded three downbidding EEOC plaintiffs...."

in 1978 by trying to persuade it to retain its age 60 policy and opposing "TWA's unilateral action in August 1978...." A-32.

Based on the above determinations, the Court concluded that "ALPA is liable under 29 U.S.C. §623(c) to the EEOC plaintiffs who were damaged by its conduct." A-33 (emphasis added). In its original decision, the Court then directed the district court

"to award to each plaintiff such amount as may be found due against each defendant in accordance with this opinion, after such evidentiary hearing as may be necessary for that purpose."

A-35. In its corrected decision, the Court revised these directions to "award to each plaintiff such relief as it is entitled to against each defendant...." A-39.

REASONS WHY THE WRIT
SHOULD NOT BE GRANTED

I

THE DECISION OF THE COURT OF
APPEALS IS NOT IN CONFLICT
WITH ANY OTHER COURT OF
APPEALS DECISIONS

As TWA notes in its petition, the Second Circuit is the only Court of Appeals to have addressed the question of union monetary liability for violation of ADEA. Only two district court decisions have directly addressed the issue.

In Neuman v. Northwest Air Lines, Inc., 28 FEP Cases 1488 (N.D. Ill. 1982), the Court held that §7(b) of ADEA does not provide for any recovery of money damages against labor organizations which violate §4(c) of ADEA, since neither §16(b) nor §17 of the FLSA, as incorporated in §7(b) of ADEA, have been construed to authorize

money damages against unions which violate the FLSA or EPA.

In EEOC v. ALPA, 489 F.Supp. 1003 (D. Minn. 1980), rev'd on other grounds, 661 F.2d 90 (8th Cir. 1981), the Court held that the EEOC could recover backpay against ALPA, relying on the general language in §7(b) of ADEA, 29 U.S.C. §626(b) ("the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter") to supersede the "reference in §626(b) to the FLSA." 489 F.Supp. at 1009. The Court in Neuman v. Northwest expressly rejected this analysis:

The general language, however, was inserted into the ADEA by Congress as a means of overruling previous judicial interpretations of the FLSA which had held that injunctive relief was unavailable in private actions under the FLSA. See Lorillard, supra, at 581. This language was not meant to expand the legal relief expressly provided under section 16(b) of the FLSA.

28 FEP Cases at 1491. In Fiedler v. Indianhead Truck Line, Inc., 670 F.2d 806, 810 (8th Cir. 1982), the Eighth Circuit substantially undermined the rationale of the EEOC v. ALPA decision when it emphasized the critical role that the remedial scheme of the FLSA plays in the scope of §7(b) of the ADEA in denying claims for pain and suffering damages under the ADEA.⁶

⁶Other Courts of Appeals to consider the remedies authorized by §7(b) of the ADEA, 29 U.S.C. §626(b), have similarly emphasized the limits imposed by the incorporation of the remedial scheme of the FLSA into the ADEA. See Pfeiffer v. Essex Wire Corp., 682 F.2d 684, 686 (7th Cir.), cert. denied, 103 S.Ct. 453 (1982); Naton v. Bank of California, 649 F.2d 691, 699 (9th Cir. 1981); Slatin v. Standard Research Institute, 590 F.2d 1292 (4th Cir. 1979); Vazquez v. Eastern Air Lines, Inc., 579 F.2d 107 (1st Cir. 1978); Dean v. American Security Insurance Co., 559 F.2d 1036 (5th Cir. 1977), cert. denied, 434 U.S. 1066 (1978). Accord Hill v. Spiegel, Inc., 708 F.2d 233, 235 (6th Cir. 1983). Cf. Rogers v. Exxon Research & Engineering Co., 550 F.2d 834, 839-840 (3d Cir. 1977), cert. denied 434 U.S. 1022 (1978).

II

**THE DECISION OF THE COURT
OF APPEALS IS CONSISTENT
WITH THE DECISIONS OF THIS COURT,
AND DOES NOT RAISE AN IMPORTANT
QUESTION OF FEDERAL LAW WHICH SHOULD
BE DECIDED IN THIS CASE**

The petition for certiorari flies in the face of two recent decisions of this Court. In Lorillard v. Pons, 434 U.S. 575, 582 (1978), this Court relied on the decision by Congress to incorporate the "remedies and procedures of the FLSA" into the ADEA "'to the greatest extent possible..." in holding that private plaintiffs in an ADEA action were entitled to a jury trial. The suggestion by TWA that this Court should determine the scope of ADEA remedies by reference to abstract statutory "purposes",

(denying pain and suffering damages on other grounds).

or by analogies to "national labor laws" other than the FLSA, is thus fundamentally inconsistent with Lorillard v. Pons.

In Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981), this Court held that an employer may not seek contribution against a labor organization under either Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-2000e-17, or the Equal Pay Act ("EPA") provisions of the FLSA, 29 U.S.C. §206(d). This Court concluded that employers were not members of the special class for whose benefit the statutes were enacted, 451 U.S. at 92, and expressly declined to consider the underlying question of an employee's right to recover money damages against a labor organization which violates the EPA. 451 U.S. at 88, n.20. As did the employer in

Northwest, TWA requests this Court to determine the rights of employees to recover damages against unions as the basis for reducing its own liability for adjudicated statutory violations.⁷

The fundamental question of an employee's rights under §7(b) of the ADEA should be determined in a case in which an employee has a direct stake in labor

⁷In analyzing whether Title VII or the Equal Pay Act provided special protection for employers, the Court held that the language of the statutes did not support implication of a right to contribution, but left open the question of a court's power under §706(g) of Title VII "to fashion relief against all respondents named in a properly filed charge...." 451 U.S. at 93, n. 28. The Court did not make a similar reservation with respect to the Equal Pay Act. Section 706(g) of Title VII expressly authorizes backpay awards "(payable by the employer, employment agency or labor organization...responsible...for the unlawful employment practice....)" 42 U.S.C. §2000e-5(g).

organization monetary liability; the secondary question of a jointly liable employer's right to shift damages under the ADEA should only be decided along with or after that decision, rather than in the first case in which it arises.

A. The Decision of the Second Circuit Is Consistent with the Decision of this Court in *Lorillard v. Pons*, and Lower Federal Court Decisions Construing the Remedial Provisions of the EPA, FLSA and ADEA

Section 7(b) of the ADEA, 29 U.S.C. §626(b), states that ADEA "shall be enforced in accordance with the powers, remedies and procedures" of Section 16 and 17 of the FLSA, 29 U.S.C. §§216 and 217, and §7(c) of the ADEA.⁸ At the time the ADEA was enacted, the FLSA prohibited labor

⁸Section 7(c) of the ADEA has been construed "to give individuals the ability to take advantage of the relief conferred in §626(b)", but is not "an independent

organizations from causing or attempting to cause an employer to discriminate on the basis of sex in the payment of wages, 29 U.S.C. §§206(d)(2), 215(a)(2), and from discriminating against any employee because that employee participated in FLSA proceedings, 29 U.S.C. §215(a)(3), but did not provide for any money damages against unions which violated those prohibitions.

Section 16(b) of the FLSA, 29 U.S.C. §216(b), provided a private cause of action only against an "employer", defined in §3(d) of the FLSA, 29 U.S.C. §203(d), as "any person acting directly or indirectly in the interest of an employer in relation to an employee...., but shall not include any

source of remedies under the statute." *Pfeiffer v. Essex Wire Corp.*, 682 F.2d at 685, n.1.

labor organization...." All courts to address the question have construed the exclusive use of "employer" in §16(b) not to authorize private actions against unions, and accordingly, have denied employee damages claims⁹ and employer contribution claims¹⁰ against unions alleged to have violated FLSA prohibitions.¹¹

⁹Lyon v. Temple University, 507 F.Supp. 471, 474-475 (E.D. Pa. 1981); Cook v. Mountain States Telephone & Telegraph Co., 397 F.Supp. 1217, 1226 (D. Ariz. 1975); Hunter v. United Air Lines, 10 FEP Cases 787, 788 (N.D. Cal. 1975); Tuma v. American Can Co., 367 F.Supp. 1178, 1181 (D.N.J. 1973).

¹⁰Northwest Airlines, Inc. v. Transport Workers Union, 606 F.2d 1350, 1355 (D.C. Cir. 1979) (footnote omitted), aff'd in part on other grounds and vacated in part, 451 U.S. 77 (1981). Denicola v. G.C. Murphy Co., 562 F.2d 889, 894-895 (3rd Cir. 1977); Wust v. Northwest Airlines, Inc., 86 LC ¶33,811 at p.48,805 (W.D. Wash. 1979).

¹¹When Congress amended §16(b) in 1974 (to apply to public employees), P.L. 93-259, §§6 and 28, and in 1977 (to remedy violations of §15(a)(3), the retaliation provisions of the FLSA), P.L. 95-151, §10, these newly

Section 17 of the FLSA, 29 U.S.C. §217, authorizes suits for injunctive relief by the Secretary of Labor, see, e.g., Lorillard, 434 U.S. at 581, including the "restraint of any withholding of payment of minimum wages or overtime compensation." Congress added this express authorization for recovery of wrongfully withheld payments to deprive FLSA violators of wrongful gains, and protect employers "who comply with the act from having to compete unfavorably with employers who do not comply." Wirtz v. Malthor, Inc., 381 F.2d 1, 3 (9th Cir. 1968).¹² The lower federal courts have routinely rejected contribution claims in \$17 actions by employer-

created private rights of actions were expressly limited to actions against an "employer".

¹²See Hodgson v. American Can Co., 440 F.2d 916 (8th Cir. 1971); Marshall v. A & M Consolidated Independent School District, 605 F.2d 186, 189 (5th Cir. 1979); Hodgson v. Wheaton Glass Co., 446 F.2d 527 (3d

defendants as inconsistent with the language and purpose of §17.13

"Because 'employers', and not unions, can be liable to employees under the FLSA for unpaid minimum wages or overtime compensation, it follows that only 'employers' are capable of wrongfully withholding such funds from employees. Therefore, only 'employers' may be restrained from engaging in such withholding."

Neuman v. Northwest, 28 FEP Cases at 1490-1491. With a single exception, the Secretary of Labor and EEOC have not brought any §17 actions against labor organizations to recover withheld wages under the EPA or FLSA.¹⁴

Cir. 1971).

¹³EEOC v. Ferris State College, 493 F.Supp. 707, 716-717 (W.D. Mich. 1980); Marshall v. Tombs Janitorial Service, 82 LC ¶33,559 (W.D. Mo. 1977); Usery v. Beloit College, 12 EPD ¶11,203 (W.D. Wisc. 1976); Brennan v. Emerald Renovators, Inc., 410 F.Supp. 1057 (S.D.N.Y. 1975); Wirtz v. Hayes Industries, 1 EPD ¶9874 (N.D. Ohio 1968).

¹⁴The only reported case in which the Secretary sought to obtain a monetary remedy

In Lorillard, this Court noted that "in enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretations and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation." 434 U.S. at 581. The Court observed that Congress made three

from a labor organization invoked the general equitable powers of the Court, rather than a construction of the scope of §17. In Hodgson v. Sagner, Inc., 326 F.Supp. 371, 374 (D.Md. 1971), aff'd sub nom. Hodgson v. Baltimore Regional Joint Board, 462 F.2d 180 (4th Cir. 1972), the Court awarded the Secretary of Labor monetary relief against a union based solely on its outrageous conduct in insisting that an employer divert to its male employees part of the back pay which it had agreed to provide to female victims of discrimination. The courts have consistently refused to read Sagner as support for an employer right to contribution against unions. Northwest v. TWU, 606 F.2d at 1356; Denicola v. G.C. Murphy, 562 F.2d at 894; EEOC v. Ferris State College, 493 F.Supp. at 716-717; Brennan v. Emerald Renovators, 410 F.Supp. at 1062.

changes in §16 in incorporating the remedial provisions of the FLSA into §7(b) of the ADEA. First, Congress provided equitable relief to employees which was not available under the FLSA. 434 U.S. at 581. Second, liquidated damages were restricted to cases of willful violations of ADEA, in contrast to the automatic award of liquidated damages in a §16(b) action under the FLSA (subject only to the "good faith" defense available under 29 U.S.C. §260). 434 U.S. at 581 and n.8. Third, the criminal sanctions in §16(a) of the FLSA, applicable to "any person" who violated §15 of the act, were deleted from the ADEA. 434 U.S. at 582. Otherwise, as the Court in Lorillard emphasized, the "selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for

those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA." 434 U.S. at 582.

While Courts have the power to award "such legal or equitable relief as may be appropriate to effectuate the purposes of ADEA...", 29 U.S.C. §626(b), (c), the general reference to "legal relief" has not been construed to authorize remedies beyond those provided for in §16(b) of the FLSA. See, e.g., Vazquez v. Eastern Air Lines, Inc., 579 F.2d 107, 109 (1st Cir. 1978), and cases cited at 14, n. 6, supra. The "equitable relief" language in §7(b) neither provides an alternative basis for money damages in ADEA actions, see Lorillard, 434 U.S. at 583, n.11, and 29 U.S.C. §626(c)(2)¹⁵, nor adds to the §17

¹⁵The original decision of the Court of Appeals, creating an equitable backpay

remedies available to the government.¹⁶

remedy for ADEA violations, A-34-35, is directly contrary to the decision in Lorillard. This Court concluded that Congress manifested an intent to provide a right to a jury trial by creating a "legal" remedy for lost wages under §16(b) of the FLSA (which had been construed to provide a right to a jury trial) rather than an equitable "backpay" remedy analogous to Title VII or §17 of the FLSA (which had been construed not to provide a right to a jury trial in actions to recover lost wages). Lorillard, 434 U.S. at 580, n.7. Indeed, the determination that ADEA created an equitable backpay remedy in private ADEA actions led the Court in Morelock v. NCR Corp., 546 F.2d 682, 688 (6th Cir. 1976), vacated and remanded, 435 U.S. 911 (1978), to conclude that a jury trial was not permitted in a private ADEA action,

Congress reaffirmed the distinction between the legal and equitable remedies in §7(b) of ADEA, 29 U.S.C. §626(b), in the 1978 amendments to ADEA. In enacting §7(c)(2) of ADEA, P.L. 95-256, §4(a), Congress characterized all "amounts owing" as a result of violations of ADEA to be legal relief. House Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 13-14, 1978 U.S. CODE CONG. & AD. NEWS 528, 535.

¹⁶In Marshall v. Eastern Airlines, Inc., 474 F.Supp. 364, 367 (S.D. Fla. 1979), aff'd on other grounds, sub. nom., E.E.O.C. v. Eastern Airlines, Inc., 645 F.2d 69 (5th Cir.), cert. denied, 102 S.Ct. 96 (1981),

The "policy" arguments offered by TWA in reliance on this general language simply fail to come to grips with the fact that §7(b), in its entirety, must be construed in the context of Congress' decision to incorporate the remedial scheme of the FLSA into the ADEA. See Lorillard, 434 U.S. at 583-585.

Congress did not modify the "employer" limitations of §16(b) of the FLSA in enacting ADEA.¹⁷ By its incorporation of the remedial scheme of the FLSA into ADEA in 1967, Congress plainly intended to make §16 and §17 of the FLSA the measure of monetary remedies available in ADEA

the Court noted that "under Section 7(b) of the ADEA, the Secretary of Labor enforces violations of ADEA and recovers damages through Section 17 of the FLSA."

¹⁷In LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286 (5th Cir. 1975), the Court rejected the argument that the "written consent" requirement of §16(b) of the FLSA should not be applied in ADEA actions

actions. Neuman v. Northwest, 28 FEP Cases at 1489. "In order to determine whether a union may be held liable to one of its members for his lost wages under the ADEA, it is necessary to determine whether a union would have such liability under the FLSA. Id. at 1490. There is no basis to imply monetary remedies against labor organizations under §7(b) of ADEA which are not provided in the FLSA.

in the absence of a discussion of that issue in the legislative history of ADEA. 513 F.2d at 289.

"Had Congress desired to read out the [written consent requirement in] the third sentence [of §16(b)] it could have done so. It has not, and we may not. Any argument that the inclusion of the consent requirement undercuts the broad remedial purposes of ADEA should be made to the legislature and not to the courts."

513 F.2d at 289 n.10.

Both the FLSA and ADEA prohibit union conduct which causes an employer to discriminate in violation of the act, compare §6(d)(2) of the FLSA, 29 U.S.C. §206(d)(2), with §4(c)(3) of the ADEA, 29 U.S.C. §623(c)(3), or to retaliate against an employee who exercises statutory rights, compare §15(a)(3) of the FLSA, 29 U.S.C. §215(a)(3) with §4(d) of the ADEA, 29 U.S.C. §623(d). In terms of deterring violations of statutory prohibitions, there is no logical difference between the remedies necessary to achieve this purpose under the EPA, the FLSA or the ADEA.

TWA's analogies to Title VII and judicially created remedies for breaches of the duty of fair representation implied under the Railway Labor Act are similarly deficient. Section 706(g) of Title VII, 42

U.S.C. §2000e-5(g), contains express language imposing backpay liability on labor organizations; sections 16 and 17 of the FLSA, and §7(b) of the ADEA, lack any express monetary remedy against labor organizations. While TWA relies on the similarity of the substantive provisions of Title VII and the ADEA as a basis for union monetary liability, in Lorillard this Court found "petitioner's argument by analogy to Title VII unavailing":

There are important similarities between the two statutes, to be sure, both in their aims - the elimination of discrimination from the workplace - and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived in haec verba from Title VII. But in deciding whether a statutory right to jury trial exists, it is the remedial and procedural provisions of the two laws that are crucial and there we find significant differences.

434 U.S. at 584 (footnote omitted, emphasis added).

The analogy to duty of fair representation remedial principles is similarly misplaced. As this Court emphasized in holding that punitive damages are not available against a union which breaches its duty of fair representation,

We are concerned here with judicially created remedies for a judicially implied cause of action. Whether the explicit statutory language of [other statutes] and the[ir] accompanying legislative history authorize punitive damages awards obviously involves different considerations.

International Brotherhood of Electrical

Workers v. Foust, 442 U.S. 42, 47 n.9 (1979). The role of the federal courts in the development of appropriate remedies under the judicially implied duty of fair representation is "fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt." Northwest v. TWU,

451 U.S. at 97. "[W]hen Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement," such as the EPA or ADEA, "[t]he judiciary may not, in the fact of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs." Id.

B. The Instant Case Is Not Appropriate for Considering the Question of Labor Organization Liability for Money Damages for Violations of §4(c) of the ADEA

The construction of §7(b) sought by TWA will not result in any benefit to plaintiffs in this action. This is not a case in which the plaintiff "members of the class for whose special benefit" ADEA was enacted, cf. Northwest v. TWU, 451 U.S. at 92, anticipate any economic loss from the

decision TWA asks this Court to review.¹⁸ Both the individual plaintiffs and EEOC appear to be content to pursue "make whole" relief solely from TWA, without the additional expense and delay of litigating the causal nexus between specific conduct by ALPA and TWA in violation of ADEA, and particular economic injuries to plaintiffs, and the relative wrongdoing of the defendants, in that regard.

Furthermore, TWA may have waived any right to shift a portion of the damages plaintiffs seek to recover by failing to plead a cross-claim against ALPA in Thurston. In any event, even if TWA prevails before this Court, it may still fail to prove that unlawful conduct by ALPA, in fact, directly caused economic

¹⁸Cf. Bowen v. United States Postal Service, 103 S.Ct. 588 (1983) (reversing a Court of Appeals decision holding that labor organizations are not liable for lost

injury to plaintiffs.¹⁹

TWA's assertion of "myriad situations ...wherein employers and unions are being jointly challenged under the ADEA," Pet. at 17, is simply unsupported by the federal court decisions reported to date. As TWA noted in its petition, only two other lower federal court decisions have addressed the question of union liability for money damages. The instant case is the only reported decision in which a labor organization has ultimately been found to have violated ADEA. Aside from cases involving the impact of the FAA Age 60 Rule on flight deck crew working conditions, only eight reported cases since the

wages following from the breach of its duty of fair representation, which resulted in a reduction in the judgment for lost wages).

¹⁹The Second Circuit held that ALPA violated §4(c)(3) by entering into the 1979 Agreement and causing TWA to implement the 1980 "fulfill bids in a timely manner" policy.

enactment of ADEA have involved labor organization defendants.²⁰

Given the lack of any economic benefit to plaintiffs from a review of the Second Circuit decision, the absence of a final judgment in this case, and the embryonic state of the lower federal court decisional law with respect to labor organization

With respect to the three plaintiffs who reached age 60 after the effective date of the 1979 agreement, TWA was no more constrained by the unchanged language in §§4.1 and 4.2 of the Plan incorporated in the 1979 Agreement than it had been under the 1977 Agreement; the construction of §4.2 which, TWA believed, authorized it to allow a flight engineer to exercise seniority rights after 60 is similarly applicable to other flight deck crew members.

With respect to the 1980 "timely manner" requirements, TWA's own official has questioned whether ALPA caused the Company to adopt the policy. See *supra* at 9-11, n. 5.

²⁰De Loraine v. MEBA Pension Trust, 499 F.2d 49 (2d Cir. 1974); Moon v. Aeronca, Inc., 541 F.Supp. 747 (S.D. Ohio 1982); Rodgers v. Grow-Kiewit Corp., 93 LC ¶13,431 (S.D.N.Y. 1981); Rhoades v. Book

monetary liability for violations of the ADEA, TWA has failed to demonstrate that this case presents important questions of federal law which are appropriate for resolution by this Court.

Press, 458 F.Supp. 674 (D. Vt. 1978); Balc v. United Steelworkers of America, 6 FEP Cases 824 (W.D. Pa. 1973); Chaudoin v. Air Line Pilots Association, 6 FEP Cases 107 (D.D.C. 1973); Hart v. United Steelworkers of America, 530 F.Supp. 294 (W.D. Pa. 1972), vacated as moot, 482 F.2d 282 (3d Cir. 1973); Kincaid v. United Steelworkers of America, 5 FEP Cases 235 (N.D. Ind. 1972).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied as to the second question presented.

Respectfully submitted,

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APPENDIX A

APPENDIX A

FAIR LABOR STANDARDS ACT OF 1938, 29 U.S.C.

§203. Definitions

As used in this chapter -

* * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

§206. Minimum wage

(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed,

between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which

exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

\$215. Prohibited acts; prima facie evidence

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person -

* * *

(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under section 214 of this title;

(3) to discharge or in any other manner discriminate against any employee because

such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

\$216. Penalties; civil and criminal liability; injunction proceedings terminating right of action; waiver of claims; actions by Secretary of Labor; limitation of actions; savings provision

(a) Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including

a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of this action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of

this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of

this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages

provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a)

of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

(d) In any action or proceeding commenced prior to, on, or after August 8, 1956, no employer shall be subject to any liability or punishment under this Act or the Portal-to-Portal Act of 1947 on account of his failure to comply with any provision or provisions of such Acts (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 213(f) of this title is applicable, (2) with respect to work performed in Guam,

the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 206(a)(3) of this title at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e) Any person who violates the provision of section 212 of this title, relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty of not to exceed \$1,000 for each such violation. In determining the amount of such penalty, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of such penalty, when finally determined, may be -

(1) deducted from any sums owing by the United States to the person charged;

(2) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor, or

(3) ordered by the court, in an action brought for a violation of section 215(a)(4) of this title, to be paid to the Secretary.

Any administrative determination by the Secretary of the amount of such penalty shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the

violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of Title 5, and regulations to be promulgated by the Secretary. Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 9a of this title.

§217. Injunction proceedings

The district courts, together with the United States District Court for the District of the Canal Zone, the District

Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title).

APPENDIX B

APPENDIX B

TRANS WORLD AIRLINES, INC.

SYSTEM BOARD OF ADJUSTMENT

In the Matter of the Arbitration)
Between:)
H.H. THURSTON)
-and-)
TRANS WORLD AIRLINES, INC.)

ALPA Case No. NY-83-78

INTRODUCTION

Arbitration hearings between the parties were held at the Company's offices in New York, N.Y. on October 5 and November 10, 1978. A transcript of the proceedings was made and post-hearing briefs were submitted by the parties in January of 1979.

APPEARANCES

For the Grievant:

Raymond C. Fay, Esq.

-B1-

For the Association (ALPA):

Gary Green, Esq.

For the Company:

Henry J. Oechler, Esq.

System Board of Adjustment:

H.F. Mokler

J.E. Kaczynski

S.H. Mariani

J.W. Hoar

Harry T. Edwards, Neutral

FINDINGS

The instant grievance protests the involuntary retirement of Captain Harold H. Thurston on June 11, 1978, at the time when Captain Thurston reached his sixtieth birthday. It is undisputed that the sole reason for the involuntary termination of Captain Thurston was his age.

Captain Thurston was first employed as a pilot with the Company in 1942. He served as a Captain with TWA from 1945

until his forced retirement in June of 1978. Captain Thurston always qualified for promotion during his tenure with the Company and the record reveals that he flew approximately 28,000 hours as a pilot for TWA. At the time of his retirement, Captain Thurston was a qualified "Captain" but he was not "Flight Engineer" qualified.

On May 19, 1978, before his forced retirement, Captain Thurston wrote to Company officials requesting continued employment beyond age 60. On May 26, 1978, TWA's Vice President of Flight Operations advised the grievant by letter that "TWA's agreement with ALPA, which applies to you, as well as the retirement program established thereunder, provides that retirement is required upon reaching

one's 60th birthday."

On June 2, 1978, Captain Thurston filed a standing bid, effective June 6, 1978, which included displacement options to Flight Engineer at five different domicile locations. However from June 6, 1978 until June 8, 1978 (the date on which grievant filed a Telegram Bid), there were no bulletins published by the Company announcing any Flight Engineer vacancies.

On June 8, 1978, Captain Thurston filed a Telegram Bid "to displace in lieu of displaced LAX Captain to Flight Engineer SFO," pursuant to Company Bid Message No. 10, dated June 6, 1978. However, the grievant was unable to change his status pursuant to his Telegram Bid because the displacements in Bid Message No. 10 were not scheduled to take

effect until July 1, 1978, after grievant's forced retirement. The Company also claims that the Telegram Bid could not have been honored under Section 19(G)(7) because Captain Thurston was not qualified for the Flight Engineer status and because the Flight Engineer position at San Francisco sought by Captain Thurston was not among the choices available to displaced pilots under Section 19(G)(3).

Captain Thurston's grievance protesting his forced retirement was filed on June 5, 1978. The grievance was denied by letter dated July 16, 1978.

In July of 1978, following the retirement of Captain Thurston, TWA officials initially indicated that, retroactive to April 6, 1978 (the effective date of the

Congressional amendments to the Age Discrimination in Employment Act), all Pilots and Flight Engineers who had reached age 60 would be allowed to continue as Flight Engineers beyond their 60th birthday. Following several meetings between Company and ALPA officials, the Company finally adopted a policy, by unilateral action, which allowed for the continued or reactivated employment of "any cockpit crewmember who is in a Flight Engineer status at age 60," retroactive to April 6, 1978. This new "Policy" was announced on August 10, 1978 and, pursuant to the Policy, several persons who had reached age 60 between April 6, 1978 and August 10, 1978, and who were Flight Engineer qualified and in Flight Engineer status at age 60, were reinstated as

Flight Engineers.¹ Additional persons were allowed to continue in employment as Flight Engineers after August 10, 1978 pursuant to the new Policy.

The Company maintains that Captain Thurston was not reinstated pursuant to the August 10, 1978 Policy because he was not in a Flight Engineer status on the date of his forced retirement. The record also indicates that there were no Flight Engineer vacancies into which Captain Thurston could have moved between April 6, 1978 and June 11, 1978 (the date of his retirement).

ALPA, in a separate court suit (Air Line Pilots Ass'n. v. TWA, 78 Civ. 3707, Federal District Court, S.D.N.Y.), has

¹One of the five persons who was reinstated under the new Policy was George Ways, an International Relief Officer (IRO) at the

alleged that the August 10, 1978 Policy adopted by TWA "constitutes a major and unilateral change in existing conditions of employment, and is therefore prohibited by the Railway Labor Act." ALPA also claims that "the 1978 amendments to ADEA did not invalidate pre-existing arrangements [requiring the retirement of all Pilots at age 60] because ADEA, even as amended, does not prohibit mandatory retirement provisions which represent bona

time of his retirement. The Company claims that Mr. Ways was reinstated because he was Flight Engineer qualified at age 60 and because he enjoyed "special contractual rights" to a Flight Engineer seat pursuant to the merger arrangement between ALPA and FEIA in 1962. Since (as noted hereafter) the Board is without authority to rule on the legitimacy of the Company's August 10, 1978 Policy, it is unnecessary to determine whether Mr. Ways did indeed have "special contractual rights" as claimed by the Company.

vide occupational qualifications...such as air safety requirements."

Articles 4.1 and 4.2 of the applicable Retirement Plan adopted by TWA and ALPA covering TWA Pilots provides that:

- "4.1 The normal retirement date is the Member's 60th birthday.
- 4.2 Members must retire by their normal retirement date unless written approval of the Company is granted for continuance of employment."

The "normal retirement" provision was included in the parties' 1954 Retirement Plan, along with a "no prejudice" clause which read as follows (Thurston Ex. 8):

- "13. It is the Company's continuing position that it has the right to require the retirement of a pilot at age 60. The Association questions the right of the Company to require such retirement. Neither the Company nor the Association intends, in any way, to prejudice its position or the

position of the other party in this regard by anything contained in this agreement or in the trust annuity plan to be drawn up as a result hereof."

In 1960, in a System Board decision involving a grievance filed by Donald R. Terry and construing the 1954 Retirement Plan and applicable collective bargaining agreement, it was held that the grievant there could not be forced to retire at age 60. However, the Neutral in the Terry case stated that the ruling was "based upon facts and circumstances relating to the grievant's employment status [in 1959] prior to the issuance of the [FAA] regulation [prohibiting persons from working as pilots after age 60]." The Neutral in Terry noted that the "Board may not concern itself with the effect of the FAA regulation or the future status of the grievant [because] the regulation was not

in existence and did not have the effect of law at the time that the issue arose ... in the Terry case.

The FAA regulation referred to in the Terry award, sometimes called the "Quesada Rule," provided that:

"Sec. 121.383(c). No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his sixtieth birthday. No persons may serve as a pilot on an airplane engaged in operations under this part if that person has reached his sixtieth birthday."

Following the adoption of the Quesada Rule, and notwithstanding the "no prejudice" language which was retained in the Retirement Plan until 1977, TWA uniformly required all flight deck crew members to retire upon reaching their 60th birthday. This practice, requiring the forced retirement of all pilots at age 60,

remained in full force and effect, without successful challenge, until the initiation of this grievance complaint.

It is noteworthy that the language in 4.2 of the Retirement Plan, requiring that pilots "must" retire at age 60, first appeared in the 1959 Retirement Plan which was actually negotiated after the issuance of the Terry award (Compare Thurston Exs. 8 & with Thurston Ex. 10). It is also noteworthy that the 1977 Retirement Plan negotiated by the parties (which was in effect when Captain Thurston retired) excluded for the first time the "no prejudice" clause that had been in the Plan since 1954. In addition, the 1977 Retirement Plan specifically provides that all prior agreements under the Plan are "superseded and terminated." The 1977

Retirement Plan requires that all pilots "must" retire at age 60 and this provision is not modified in any way by a "no prejudice" clause or like provision.

Therefore, even if the "no prejudice" clause somehow limited Articles 4.1 and 4.2 in the Retirement Plans in force from 1954 until 1977, no such limitation appeared in the Retirement Plan or in the parties' collective bargaining agreement when Captain Thurston was forced to retire in 1978.

DISCUSSION

Given the facts of this case, it must be held here that the grievance is without merit. It must be emphasized, however, that in deciding this case, the System Board renders no opinion with respect to

any legal rights that Captain Thurston might have under the ADEA. Nor does the Board intend to render any opinion with respect to what rights, if any, Captain Thurston might have under the Company's August 10, 1978 Policy (if that Policy is hereafter found to be lawful by the courts).

The simple question here is whether Captain Thurston had any rights under the parties' agreements (in force in June of 1978) to be retained in employment as a Captain, First Officer or Flight Engineer after he had reached his 60th birthday. On the record in this case, it seems perfectly clear that he had no such rights.

First of all, whether or not the Company may permissibly retain "Flight Engineers" beyond age 60 under existing

law, the facts here indicate that Captain Thurston was not a Flight Engineer at the time of his forced retirement, nor was he even qualified to assume such a position.

Second, there was nothing in the parties' agreements which allowed Captain Thurston to move into a Flight Engineer position in the absence of an available vacancy and at a time when he was not Flight Engineer qualified. Grievant's counsel has pointed to Section 6(B)(16) and (17) and 19(A)(4) to suggest otherwise; however, even a cursory reading of those provisions makes it plain that they afforded no relief for Captain Thurston at the time of his forced retirement in June of 1978. Section 6(B)(16) refers to pilots who "fail initial upgrading;" Section 6(B)(17) refers to

pilots who "fail to requalify;" and Section 19(A)(4) refers to pilots whose "medical certificates are subject to operational limitation imposed by the Administrator." None of these provisions can be seen to have given Captain Thurston the right to automatic placement in a Flight Engineer position as claimed by grievant's counsel.

Third, for the reasons noted hereinabove, it must be found that the Terry decision is not controlling in this case. The "no prejudice" language adopted in the 1954 Retirement Plan was excluded from the 1977 Retirement Plan. In addition, the 1959 Retirement Plan, which was negotiated after the issuance of the Terry award, added language stating that pilots "must retire by their normal retirement date" at

age 60. Thus, the explicit language of the Retirement Plan in force in June of 1978, coupled with the longstanding practice uniformly followed by the parties between 1960 and 1978, make it rather clear that Captain Thurston was properly retired upon reaching his 60th birthday in June of 1978. The Terry decision, by its terms, was a limited judgment which was no longer applicable in 1978 due to the changed circumstances occurring between 1960 and 1978.

As for the claim that Captain Thurston should have been retained under the Company's August 10, 1978 Policy, the simple answer to this is that it is a matter that is beyond the jurisdiction of this Board. The Company Policy was adopted unilaterally in an attempt to

comply with the 1978 amendments to the ADEA. It is clear, therefore, that the Policy was not contractually mandated. Whether the policy was mandated by and permissible under existing law is a matter for the courts to decide. If it is hereafter determined that the Company was justified in adopting the August 10, 1978 Policy, then Captain Thurston may of course raise whatever claim he may have to any rights or benefits given pursuant to the Policy. However, this is not an issue that can be decided by the System Board at this time.

One further point should be made here in conclusion. At the start of these proceedings, Captain Thurston requested that this case should be decided by the Neutral alone, without the participation of the

Company and ALPA Board members. Implicit in this request was the suggestion that ALPA was not a neutral party in this case and that the case would therefore be "stacked" against Captain Thurston. To set the record clear, the Neutral is constrained to note that, without regard to the so-called official Association position as stated by the ALPA attorney, the two ALPA designees on the Board did not hold to any partisan view. In fact, after hearing the evidence in the case, both ALPA designees argued forcefully on behalf of Captain Thurston during the deliberations of the Board leading to this decision. Therefore, the Neutral has no reservations in stating that Captain Thurston received a fair hearing before this System Board.

③
No. 83-997

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In the Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC., PETITIONER

v.

HAROLD H. THURSTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

**BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION IN OPPOSITION**

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QUESTIONS PRESENTED

1. Whether petitioner violated the Age Discrimination in Employment Act by involuntarily retiring airline pilots at age 60, when they are disqualified from serving as pilots, because it refused to allow them to transfer to other jobs after age 60 although all younger, similarly-situated pilots were allowed to do so.

2. Whether petitioner's violation of the Age Discrimination in Employment Act was willful.

3. Whether unions are liable for back pay under the Age Discrimination in Employment Act.

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COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A39) is reported at 713 F.2d 940. The opinion of the district court (Pet. App. A44-A61) is reported at 547 F.Supp. 1221.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1983, and rehearing was denied on November 10, 1983 (Pet. App. A42). The petition for a writ of certiorari was filed on December 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This is a suit by three former pilots of Trans World Airlines, Inc. (TWA), and the Equal Employment Opportunity Commission as plaintiff-intervenor, charging that the airline violated the Age Discrimination in Employment

Act of 1967 (ADEA), 29 U.S.C. (& Supp. V) 621 *et seq.*, by refusing transfers to, and retiring, captains and co-pilots when they reached age 60. The pilots bargaining representative, the Air Line Pilots Association International (ALPA), was named as co-defendant.

TWA employs approximately 3000 crew members in four cockpit positions. The captain and the co-pilot (or first officer), who assists him, fly the plane. Pet. App. A6. The flight engineer monitors the mechanical, electrical, and electronic functioning of the aircraft. On certain long-distance flights, there is a fourth crew member, an International Relief Officer (IRO), who acts as third in command and who, *inter alia*, performs co-pilot and flight engineer duties. Pet. App. A5-A6.

The Federal Aviation Administration prohibits persons from serving as "pilots" on commercial aircraft beyond age 60 (14 C.F.R. 121.383(c)). Captains, co-pilots, and IROs are considered "pilots" subject to this restriction, but flight engineers are not (Pet. App. A7).

Historically, under the retirement plan negotiated between TWA and ALPA, all crew members were retired at age 60. Pet. App. A8. The company reassessed that policy after passage of the 1978 Amendments to the ADEA which, *inter alia*, amended the Act to prohibit employees' involuntary retirement on the basis of age before the age of 70. Pub. L. No. 95-256, § 4(f)(2), 29 U.S.C. (Supp. V) 623(f)(2). For several months after the April 6, 1978, effective date of the amendments, TWA continued to require all crew members to retire at age 60. On July 19, 1978 (in a letter to ALPA from TWA's Senior Vice President for Administration, David Crombie), the company announced that it was legally obligated to employ all pilots as flight engineers beyond age 60 and to offer to reinstate all pilots mandatorily retired after April 6, 1978, as flight engineers. The text

of the letter made clear that the recall or continued employment of captains and co-pilots would not depend on the existence of flight engineer vacancies. C.A. App. 426-427.

On August 10, 1978, by direction of J. Edward Frankum, Vice President of Flight Operations (C.A. App. 1006-1009), TWA, issued a bulletin to its personnel stating that "any cockpit crew member who is in flight engineer status at age 60" may not be compelled to retire (Pet. App. A9).¹ TWA accordingly offered to reinstate persons who were retired between April 6 and August 10, 1978, while holding the position of flight engineer or IRO. No offer was made to similarly situated captains or co-pilots (*ibid.*).²

Pursuant to the bulletin, TWA allows flight engineers and IROs to continue employment after their 60th birthdays as flight engineers unless they notify the company that they wish to retire. A TWA captain or co-pilot is mandatorily retired on his 60th birthday, however, unless he has bid on and been awarded a flight engineer vacancy with an

¹Frankum opposed the employment of pilots beyond age 60, including flight engineers, and disagreed with the position taken in Crombie's July 19 letter (C.A. App. 828-836, 1000-1005, 1022). Frankum stated that when Crombie was hospitalized shortly after July 19, "I, in effect, disavowed [that] letter and we proceeded from there" (C.A. App. 1005A).

²On the day TWA issued its bulletin, ALPA filed suit against the company alleging that its revised policy was a unilateral change in the pilots' rates of pay, rules, or working conditions, in violation of Section 6 of the Railway Labor Act, 45 U.S.C. 156. ALPA also sought a declaratory judgment that TWA's policy was not required by the ADEA amendments because a maximum age of 60 constituted a bona fide occupational qualification for flight engineers under Section 4(f)(1) of the Act, and because the ADEA amendments were not effective until the expiration of the then existing collective bargaining agreement or January 1, 1980, whichever occurred first. Pet. App. A4-A5. ALPA's action was consolidated in the district and appellate courts with this action. ALPA lost in both courts and has not sought further review here.

effective date before his 60th birthday. *Ibid.*³ TWA refuses to honor a bid for vacancies effective after the officer's 60th birthday on the ground that "[bids] can only be awarded to somebody on the seniority list and at age 60 a man goes off the seniority list" (C.A. App. 930, 974). The only officers who go "off the seniority list" at age 60, however, are captains and co-pilots because, according to TWA, they are required to be retired on that date under the FAA regulation.

The TWA-ALPA collective bargaining agreement (Working Agreement) does not deal specifically with the situation of captains and co-pilots barred from continuing in these positions by the FAA regulation.⁴ In contrast, the Working Agreement does provide that pilots who are precluded from retaining their present positions for non-age related reasons remain employed and may exercise their seniority to secure alternative assignments. For example, captains and co-pilots unable to retain the FAA's first-class medical certificate but who are still medically qualified to become flight engineers may automatically "displace" or "bump" a less senior flight engineer, without awaiting a flight engineer vacancy. Pet. App. A10. If the captain or co-pilot lacks

³In addition, since January 1980, TWA has required successful captain downbidders to "fulfill their bids in a timely fashion" Pet. App. A11. The result is that most downbidding captains must train for and assume flight engineer positions before age 60, with a concomitant loss in pay and responsibility. Furthermore, TWA previously had placed a successful downbidder on off-duty-without-pay status after his 60th birthday if he had not then passed the written examination prepared by the FAA as a prerequisite for pilot entry into flight engineer training. Since January 1980, however, TWA has permanently cancelled the bid of any captain who cannot prove that he has passed the flight engineer examination when reporting for training. Pet. App. A11-A12.

⁴Section 17 of the Working Agreement, entitled "Seniority", simply provides that "[a]ny pilot whose services with the company are permanently severed shall forfeit his seniority rights" (C.A. App. 250, 294 (Section 17(A)(6))).

sufficient seniority to displace, he is not discharged; rather, he is entitled to go on unpaid medical leave for up to five years (*ibid.*). Similarly, the Working Agreement provides that a pilot whose position is eliminated at his domicile due to reduced manpower needs may use his seniority to displace the least senior pilot in any status at his current or last former domicile, or in his current status anywhere in TWA's system. *Id.* at A11. Like his medically disabled counterpart, the jobless pilot who lacks sufficient seniority to displace is not discharged. Rather, he is placed in furlough status, which may extend for a period of up to ten years, during which time he continues to accrue seniority for purposes of a recall (*ibid.*). The Working Agreement also provides that a pilot who fails training to upgrade to captain or co-pilot, though permanently disqualified from holding those positions, is not discharged. He is instead assigned to permanent flight engineer status at his permanent domicile, whether or not a flight engineer vacancy there exists (*ibid.*). In the same vein, TWA has permanently downgraded pilots to a lower position for which they are qualified, as a disciplinary measure in response to demonstrated incompetence, without requiring the pilot to bid for a vacancy (*ibid.*). This practice, for which there is apparently no contractual provision, routinely occurs (*ibid.*).

2. In November 1978, respondents Harold Thurston and Christopher Clark filed a class action complaint in the United States District Court for the Northern District of Illinois, alleging that the refusal of TWA and ALPA to permit class members to transfer from captain to flight engineer positions on their 60th birthdays violated the ADEA. On April 19, 1979, C.A. Parkhill was joined as a party plaintiff, and on August 14, 1979, the case was transferred to the United States District Court for the Southern District of New York (C.A. App. 2, 4, 7). On August 25, 1980, EEOC's motion to intervene as a party plaintiff was granted (C.A. App. 9).

3. With the undisputed evidence summarized above before it, the district court ruled that TWA was entitled to judgment as a matter of law. The court held that the pilots and co-pilots who had been retired under TWA's policy failed to establish a prima facie case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), because none could show that a flight engineer vacancy existed "at the time [he] applied and [was] eligible for the job" (Pet. App. A54-A57). The court further ruled that the evidence in its entirety did not establish a prima facie violation of the ADEA (*id.* at A57-A59). It reasoned that "any denial of Flight Engineer status to pilots resulted from the neutral application of [a] bona fide seniority system and not by discriminatory treatment on the basis of age" (*id.* at A60).

4. The court of appeals reversed with directions to enter summary judgment in favor of respondents. The court held that respondents established a prima facie case of discrimination through direct evidence of disparate treatment, *i.e.*, that "TWA grants the downgrading requests of all pilots with sufficient seniority except those of captains and first officers who reached age 60" (Pet. App. A22-A24). The court noted that petitioner had not offered a legitimate, nondiscriminatory reason for its policy (*id.* at A31 n. 18), and further held that petitioner's actions were indefensible under either the "bona fide occupational qualification" or the "bona fide seniority system" exception to the ADEA, 29 U.S.C. 623(f)(1) and (2) (*id.* at A25-A29).

On the issue of relief, the court determined that liquidated damages were to be awarded against TWA pursuant to Section 7(b) of the ADEA, 29 U.S.C. 626(b), because its violation was willful (Pet. App. A33-A34). Citing *Goodman v. Heublein, Inc.*, 645 F.2d 127 (2d Cir. 1981) and *Wehr v. Burroughs Corp.*, 619 F.2d 276 (3d Cir. 1980), the court held that where, as here, an employer intentionally treats older workers less favorably because of their age, its

violation is willful if it "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA" (Pet. App. A33). The court concluded that the company's "attempt to escape full compliance [with the 1978 ADEA amendments] by authorizing restricted down-bidding by captains and first officers approaching 60 does not relieve it of liability for liquidated damages based on its continued discrimination against them through these unlawful restrictions" (*id.* at A34).

The court also originally held that the respondents were entitled to recover back pay against ALPA (Pet. App. A34-A35). In response to a petition for rehearing filed by ALPA which argued, *inter alia*, that the ADEA does not provide such a remedy against unions,⁵ the court amended its opinion (*id.* at A37). Its amended opinion states (Pet. App. A38):

Under the FLSA employees may bring actions to recover money damages against employers, *id.* § 216(b), and the term "employer" in FLSA expressly excludes labor organizations. *Id.* § 203(d). This express statutory incorporation of FLSA precludes a monetary damage or back pay award against ALPA. *Neuman v. Northwest Airlines, Inc.*, 28 F.E.P. Cases 1488, 1490-91 (N.D. Ill. 1982); see *Brennan v. Emerald Renovators, Inc.*, 410 F. Supp. 1057, 1059 n.5 (S.D.N.Y. 1975).

ARGUMENT

1. The ADEA prohibits an employer from discriminating against any employee between the ages of 40 and 70

⁵This issue was not thoroughly discussed in the parties' appellate briefs. See Br. for Appellants Thurston *et al.* and EEOC 28-29 n. 32 (filed Jan. 14, 1983); Br. for Defendant-Appellee Air Line Pilots Association, International at 25 (filed Feb. 7, 1983); Reply Br. For Appellants Thurston *et al.* and EEOC at 18 n.17 (filed Mar. 21, 1983).

"with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age," and from limiting, segregating, or classifying its employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. 623(a)(1) and (2). The Act further forbids the involuntary retirement of any employee within this protected age group "because of the age of such individual" (29 U.S.C. (Supp. V) 623(f)(2)). The court of appeals correctly held on undisputed evidence that TWA was in direct violation of these statutory prohibitions. There is no need for further review of that decision.⁶

The policy that adversely affected TWA's captains here was age-based on its face. The company forced a captain to retire on his 60th birthday if he had not secured a flight engineer bid with an effective date prior to that date. In a tour de force of circular reasoning, TWA refused to honor a bid for a vacancy carrying an effective date beyond a

⁶The decision below is consistent with the only other appellate decision involving the application of the ADEA and the FAA regulation to the flight crew (*Criswell v. Western Air Lines, Inc.*, 709 F.2d 544 (9th Cir. 1983)). Appeals are pending in cases involving this issue in two other circuits (*Monroe v. United Air Lines, Inc.*, Nos. 83-1245 *et al* (7th Cir.) (jury found violation of ADEA); *Johnson v. American Airlines, Inc.*, No. 83-1616 (5th Cir.) (jury denied recovery)).

At least five airlines have agreed to consent decrees requiring them to reinstate as flight engineers captains who were required to retire at age 60. *Worley v. Continental Air Lines, Inc.*, No. CV-80-1110-WMB(Kx) (C.D. Cal. consent decree entered Dec. 27, 1982); *Kiehl v. Pan American World Airways, Inc.*, No. C-81-4274-WAI (N.D. Cal. consent decree entered Jan. 28, 1983); *Santorelli v. USAir, Inc.*, No. 81-1053-A (E.D. Va., consent decree entered Mar. 16, 1982); *Richardson v. Alaska Airlines, Inc.*, No. C-81-974V (W.D. Wash. consent decree entered Nov. 1, 1982); *Neuman v. Northwest Airlines, Inc.*, No. 79 C 1570 (N.D. Ill. joint motion for entry of consent decree filed Mar. 15, 1983).

captain's 60th birthday because he was deemed to be retired at 60, and therefore stripped of the seniority that would entitle him to be awarded such a bid. These facially age-based practices, moreover, were not justified by the fact that a captain or co-pilot at age 60 is precluded from actively serving in those capacities by virtue of an FAA regulation (14 C.F.R. 121.383(c)).⁷ It is undisputed that TWA uniformly permits all pilots who are disqualified from retaining their current positions for *non-age related* reasons to remain employed, to continue to accrue and exercise seniority, and thus to move, immediately or eventually, into positions for which they remain qualified. TWA proffered no reason for denying the same treatment to older pilots similarly disqualified by virtue of the FAA regulation.

The court of appeals correctly held that this "direct evidence of a differentiation based solely on age * * * established * * * a prima facie case" (Pet. App. A24). Cf. *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (employer's reliance on sex-segregated mortality tables that disadvantage women is a violation of Title VII because "[s]uch a practice does not pass the simple test of whether 'treatment of a person [is] in a manner which but for that person's sex would be different' "). See also *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.), cert. denied, 434 U.S. 966 (1977); *Rodriguez v. Taylor*, 569 F.2d 1231, 1237 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978).

Petitioner's claim (Pet. 17-21) that this holding is in conflict with the holdings of other circuits on the scope of the ADEA is based on a mischaracterization of the opinion below. The court did not hold that " 'because TWA routinely accommodates other employees . . . for *non-age*

⁷The validity of the FAA rule is not at issue in this case.

reasons,' it must accord the *same* treatment to age-60 captains and first officers . . . ' (*id.* at 18 (emphasis in original)). Rather, the language selectively quoted by TWA reads in full (Pet. App. A31 (emphasis added; footnote omitted)):

because TWA routinely accommodates other employees who seek to downgrade to flight engineer for non-age reasons *and has failed to come forward with a permissible reason for its refusal to accord the same treatment to age-60 captains and first officers*, the Thurston litigants and the EEOC claimants must prevail on their ADEA claim. The sole reason for its discrimination against age-60 captains and first officers is their age; this is prohibited by the ADEA.

Thus, contrary to petitioner's claim, the decision below establishes no "new ADEA standard" under which an employer who accommodates employees for non-age related reasons "must provide the same accommodation * * * because of age" (Pet. 17-18). Rather, the court does no more than reiterate the basic principle of the ADEA, *i.e.*, that an employer may not withhold employment privileges and opportunities from older workers simply because of their age.⁸

⁸Petitioner's professed confusion concerning its ADEA obligations in the wake of this case (Pet. 18) is disingenuous. The employer in petitioner's first hypothetical who allocates vacation benefits on the basis of length of service does not offend the Act. Indeed, older employees are generally among the most senior in the work force, and thus tend to be favored by a system that distributes benefits on the basis of length of service. That is the chief reason Congress enacted Section 4(f)(2) of the Act, immunizing action taken to observe the terms of a bona fide seniority system. See 113 Cong. Rec. 7076 (1967) (remarks of Senator Javits). On the other hand, the employer who uses age and/or length of service as criteria for *adverse* actions opens himself to ADEA liability. See *EEOC v. Westinghouse Electric Corp.*, No. 83-5008 (3d Cir. Dec. 29, 1983); *EEOC v. City of Altoona*, No. 82-5805 (3d Cir. Dec. 13, 1983). Cf. *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980),

That holding is entirely consistent with legislative intent and prevailing case law. Contrary to petitioner's claim (Pet. 19-20), the court clearly understood that the ADEA amendments do "not require employers to provide special working conditions for older workers to allow them to remain or be employed" (H.R. Rep. 95-527, 95th Cong., 1st Sess. 12 (1977)), but instead mandate "that an employee's age be treated in a neutral fashion, neither facilitating nor hindering advancement, demotion, or discharge" *Parcinski v. Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982), cert. denied, No. 82-459 (Jan. 10, 1983). Accord: *Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), cert. denied, 455 U.S. 943 (1982); *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958, 960 (8th Cir. 1978). Accordingly, in rejecting petitioner's argument that a ruling in favor of respondents required preferential treatment,⁹ the court stated (Pet. App. A29-A30):

cert. denied, 451 U.S. 945 (1981) (hiring criterion of less than five years experience found to result in discrimination on the basis of age).

Under petitioner's second hypothetical, the refusal to pay sick pay to a captain disabled one day in advance of his 60th birthday, when he is disqualified from remaining in that position, would not ordinarily constitute age-based discrimination. An inference of discrimination would surely arise, however, if the employer paid such sick pay to similarly situated younger pilots, *e.g.*, the 50-year old captain who is disabled one day prior to the abolition of his job and who is unable to displace a less senior captain.

⁹Petitioner also incorrectly suggests (Pet. 20) that EEOC seeks preferential treatment for age 60 captains or first officers. What EEOC will seek on remand is "such * * * equitable relief as may be appropriate to effectuate the purposes of [the] Act" (29 U.S.C. 626(b)) which, at a minimum, must permit captains and first officers to retain their positions until age 60 and then treat them like all similarly situated employees no longer able to perform their jobs for reasons other than age — *i.e.*, permit them to transfer to flight engineer positions if they have sufficient seniority to do so, or, if not, to remain on vacation and

Our holding does not require TWA to provide "special working conditions for older workers to allow them to remain or become employed." H.R. Rep. No. 527, *supra*, at 12; *Parcinski v. Outlet Co.*, *supra*, 673 F.2d at 37. Appellants do not ask for "special treatment," *Parcinski, supra*; rather, they merely seek the same treatment accorded all younger captains and first officers who become unable to serve in their former capacities for non-age reasons. There is nothing "special" or "preferential" about equal treatment.

2. As the court below noted (Pet. App. A33), the ADEA permits recovery of liquidated damages, in effect double the pecuniary value of the lost wages, in cases of "willful" violations (29 U.S.C. 626(b)).¹⁰ Drawing on its previous

then leave without pay while accruing sufficient seniority to entitle them to a position. See pages 4-5, *supra*; CA. App. 841-842.

Equally spurious is petitioner's claim (Pet. 20) that it treated age 60 captains and co-pilots no less favorably than younger, similarly situated pilots, because many older officers were successful in complying with the company's restrictive downbidding procedure. As the court below recognized, "[t]he ADEA, like Title VII, 'does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her [protected class] * * * were hired. . . . Every individual employee is protected against . . . discriminatory treatment'" (Pet. App. A25, quoting *Connecticut v. Teal*, 457 U.S. 440, 455 (1982) (emphasis in original)). As the court further noted (Pet. App. A25), TWA's policy exacts a toll even from successful downbidders. These pilots are forced to bid for a vacancy substantially in advance of their 60th birthdays in order to avoid the risk that none will later be available, and to enter training and fill that vacancy as close as possible to its effective date (see note 3, *supra*). The result is that a captain perfectly capable and qualified to retain the position in which he has served the company for years is forced prematurely into the less prestigious and lower paying flight engineer job.

¹⁰29 U.S.C. 626(b) incorporates into the ADEA by reference the remedies provided in 29 U.S.C. 216(b) for violations of the Fair Labor Standards Act (FLSA) but specifically limits the payment of "liquidated damages" to "cases of willful violations" of the ADEA. The

dicta in *Goodman v. Heublein, Inc.*, 645 F.2d 127, 131 and n.6 (2d Cir. 1981), the court held that where, as here, an employer intentionally treats older workers less favorably because of their age, its ADEA violation is willful if it "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA" (Pet. App. A33). In holding that specific intent to violate the ADEA is unnecessary to establish willfulness (*ibid.*), the court did not, as petitioner contends (Pet. 9-11), depart from the law of any other circuit. Moreover, under the standard adopted here, liquidated damages do not "follow *a fortiori* from a finding of disparate treatment" (Pet. 10).¹¹

a. Contrary to petitioner's claims (Pet. 10-11), the Seventh Circuit has not embraced a specific intent standard for willfulness, and the First Circuit has never squarely addressed the issue of when liquidated damages under the ADEA may appropriately be awarded.

The Seventh Circuit in *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 156 (1981), held that an employer acts willfully if his "actions were knowing and voluntary and * * * he knew or reasonably should have known that

FLSA authorizes recovery by injured employees of "the amount of their unpaid minimum wages * * * [and] an additional equal amount as liquidated damages" (29 U.S.C. 216(b)).

¹¹Petitioner also faults the court for enunciating its standard in the context of a case that is being disposed of on summary judgment (Pet. 12). Other courts of appeals have addressed the elements of a willful violation in the course of reviewing jury instructions on the issue of liquidated damages. The standard comprises a principle of law; petitioner has not suggested why the procedural context in which the issue reaches the court of appeals makes any difference. It is entirely appropriate for the court of appeals to consider the issue on review of a motion for summary judgment, when, as here, all factual issues underlying the claim for liquidated damages are undisputed (see pages 17-18, *infra*; Pet. App. A5 n.5; A13).

those actions violated the ADEA." The court expressly noted that this standard—designed to limit willful violations to "situations in which an employer consciously discriminates against an employee because of his age" as opposed to those in which discrimination arises "from an unconscious application of stereotyped notions of ability" (665 F.2d at 155)—"is consistent with the standard endorsed in dicta * * * [in] *Goodman v. Heublein, Inc.*" (665 F.2d at 155 n.9). It is, of course, the standard enunciated in the *Goodman* dicta that the court below adopted.

Any suggestion that the *Syvock* standard requires specific intent to violate the law was dispelled by the Seventh Circuit in its later decision in *Orzell v. City of Wauwautosa Fire Dep't*, 697 F.2d 743 (1983), cert. denied, No. 83-205 (Nov. 28, 1983). In *Orzell*, the city defendant required a fire department assistant chief to retire when he became 55, and maintained that the action was lawful under Section 4(f)(1) of the ADEA, 29 U.S.C. 623(f)(1), because it was implementing a bona fide occupational qualification for the position. The magistrate expressly found that while the city "did not proceed maliciously," it "knew or should have known" that the mandatory retirement violated the ADEA (697 F.2d at 758-759 (emphasis added)). The Seventh Circuit upheld the magistrate's ultimate finding of willfulness on the ground that it correctly conformed to the *Syvock* standard, even though the magistrate had relied on *Wehr v. Burroughs Corp.*, 619 F.2d 276, 283 (3d Cir. 1980), using a test that expressly excludes the element of specific intent (*Orzell*, 697 F.2d at 747, 757 n.28).¹²

¹²Indeed, according to *Orzell*, 697 F.2d at 757 n.28, *Syvock* expressly approved the reasoning in *Wehr* as well as in *Kelly v. American Standard, Inc.*, 640 F.2d 974 (9th Cir. 1981)—two of three decisions which petitioner claims to be inconsistent with *Syvock* (Pet. 11). The third, *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176 (6th Cir. 1983), held that an ADEA plaintiff is entitled to liquidated damages if he shows

The First Circuit in *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1979), did not purport to decide under what circumstances an employer's ADEA violation would be deemed willful. In *Loeb*, the jury had found the employer's violation willful, and liquidated damages had been awarded. The court of appeals rejected the employer's claim on appeal that this award was improper because there was no specific finding that it had not acted in good faith. The court noted in passing that "a finding of 'willfulness' would seem to preclude a finding of 'good faith' " (600 F.2d at 1020). At this point, the court simply quoted the definition of willfulness used in criminal cases, which includes a requirement of specific intent to do something the law forbids (*id.* at 1020, n.27).¹³ The First Circuit has never decided whether the ADEA standard of willfulness might be met by a showing that the employer either knew or should have known of the statutory requirement, or acted with reckless disregard of those requirements. To the extent that the *Loeb* dictum indicates that such a showing might be insufficient, we

that the "employer's actions were voluntary and intentional, because of age" and that the employer "was reckless in not knowing that his actions were governed by the ADEA or that the employer acted in reckless disregard of whether his actions were covered by the ADEA" (696 F.2d at 1184). In so holding, the Sixth Circuit expressly noted that it agreed with *Syvock* (*ibid.* n.12).

¹³The quotation was taken from E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 14.06, at 384 (3d ed. 1977), discussing mens rea in the criminal context. Liquidated damages are not punitive, however; they instead compensate for losses that are "too obscure and difficult of proof for estimate other than by liquidated damages." H.R. Rep. 95-950, 95th Cong., 2d Sess. 14 (1978) (quoting *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-584 (1942)). While willful in the criminal context generally means an act done with bad purpose, it is employed in the civil context to characterize an act that is "intentional, or knowing, or voluntary, as distinguished from accidental" (*United States v. Murdock*, 290 U.S. 389, 394 (1933)) or "conduct marked by careless disregard whether or not one has the right to so act." *United States v. Illinois Cent. R.R.*, 303 U.S. 239, 243 (1938).

suggest that the First Circuit might well today reconsider that dictum in light of the rejection by all other courts of appeals that have subsequently considered the issue of a specific intent standard for awarding liquidated damages under the ADEA. *Wehr v. Burroughs Corp.*, 619 F.2d at 283; *Spagnuola v. Whirlpool Corp.* 641 F.2d 1109, 1113-1114 (4th Cir.), cert. denied, 454 U.S. 860 (1981); *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1184 (6th Cir. 1983); *Kelly v. American Standard, Inc.*, 640 F.2d at 979-980.¹⁴ We submit, therefore, that there is no present inter-circuit controversy over the showing necessary to support an award of liquidated damages under the ADEA.¹⁵

b. Petitioner argues that, under the willfulness standard adopted by the court of appeals, liquidated damages "follow *a fortiori* from a finding of disparate treatment"

¹⁴Section 6(a) of the Portal-to-Portal Act of 1947, 29 U.S.C. 255(a), establishing a three-year statute of limitations for "willful" violations of the FLSA, is incorporated into the ADEA by 29 U.S.C. (Supp. V) 626(e)(1). As in cases involving liquidated damages under the ADEA, the courts have consistently held that specific intent to violate the law is not required to establish a willful violation for purposes of this statute of limitations provision. *Brennan v. Heard*, 491 F.2d 1, 3 (5th Cir. 1974); *EEOC v. Central Kansas Medical Center*, 705 F.2d 1270, 1274 (10th Cir. 1983); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 461-462 (D.C. Cir. 1976).

¹⁵As petitioner notes (Pet. 11-12 n.*), *Koyen v. Consolidated Edison Co.*, 560 F.Supp. 1161, 1165 (S.D.N.Y. 1983), stated that a defendant must act "with knowledge of the illegality of his action" in order to be subject to liquidated damages under the ADEA. But that case also expressly approved the award of liquidated damages upon a showing that "the defendant deliberately, intentionally, and knowingly discharged plaintiff because of his age, and * * * knew or *should have known* such conduct was unlawful." 560 F. Supp. at 1166 (emphasis added). See *Whittlesey v. Union Carbide Corp.*, 567 F.Supp. 1320, 1330 (S.D.N.Y. 1983) (reading *Koyen* as requiring, for liquidated damages, a showing that the employer acted with knowledge of the illegality of his action or "at least an inexcusable disregard," and agreeing with that requirement).

(Pet. 10). This is incorrect; the standard has two elements. It is not enough that the employer's discriminatory acts are knowing and voluntary, *i.e.*, not "the result of negligence, mistake, or other innocent reason" (Pet. App. A33-A34)—a requirement that will be satisfied in a disparate treatment case, where the employer intentionally discriminates on the basis of age. The court also requires a further showing, that "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA" (Pet. App. A33). Disparate treatment, standing alone, does not render the employer liable for liquidated damages.

Nor did the court hold that that TWA's violation was willful because it was "merely aware of the existence of the statute" (Pet. 10). It is, of course, undisputed that TWA knew of the ADEA's requirements: the policy under attack here was promulgated after review of the 1978 amendments to the Act. Moreover, it is also undisputed that the company, through Vice President Crombie, initially decided in view of those amendments that it was required to reinstate and continue to employ age 60 captains as flight engineers, regardless of the existence of flight engineer vacancies (pages 2-3, *supra*). It is further undisputed that that decision was disavowed by TWA Vice President Frankum, that Frankum opposed the employment of any flight crew member beyond age 60, and that the company's ultimate policy of retiring and refusing transfers to age 60 captains and first officers was issued at his direction (*ibid.*). Clearly, petitioner's facially discriminatory policy did not arise from an unconscious application of stereotyped assumptions about the ability of these age 60 pilots to perform in the flight engineer positions they sought. See *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d at 155-156 and n.10. TWA entertained no such assumptions because it allowed flight engineers to continue to work beyond 60 and, indeed,

contested ALPA's claim that an age limit of 60 was a legitimate qualification for the flight engineer position (note 2, *supra*). The court below properly concluded that petitioner's restrictive transfer policy, which catapulted into retirement those captains and first officers who failed to comply with it, was nothing more than "an attempt to escape full compliance" with the 1978 ADEA amendments (Pet. App. A34), an attempt which, consciously undertaken, rendered the company liable for liquidated damages.

3. The court correctly determined (Pet. App. A31-A33) that ALPA violated Section 4(c)(3) of the ADEA, 29 U.S.C. 623(c)(3), which makes it unlawful for a labor organization "to cause or to attempt to cause an employer to discriminate." In its amended opinion, however, the court held that the statute immunizes unions from monetary liability for their discriminatory acts (Pet. App. A37-A39).

Like petitioner (Pet. 13-17), the EEOC took the position below that a labor organization that has violated the ADEA should be held liable for back pay and other relief on the same terms as an employer. As petitioner points out, however, the court below is the first court of appeals that has addressed this issue. Since the enactment of the statute in 1967, the question has been presented in only two other instances, both involving the union in this case: *EEOC v. ALPA*, 489 F. Supp. 1003, 1009 (D. Minn. 1980), rev'd on other grounds, 661 F.2d 90 (8th Cir. 1981) (union held liable for back pay award); *Neuman v. Northwest Airlines*, 28 Fair Empl. Prac. Cas. (BNA) 1488, 1491 (N.D. Ill. 1982) (union held not liable for monetary damages). In view of the embryonic state of the law and the absence of a split in the circuits, we submit that there is as yet no need for review by this Court of this issue.

In any event, the proper parties to seek further review of this issue would be respondents, the ones who were injured by ALPA's discriminatory conduct.¹⁶ In the posture of this case, TWA's petition is analogous to a claim for contribution by one violator of federal law against another. That claim should be rejected. Cf. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 91-95 (1981) (employer has no express or implied right of action for contribution from a union under the Equal Pay Act, which was not enacted for employers' special benefit).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1984

¹⁶The Commission has not done so in light of the absence of a conflict in the circuits, the fact that the court's cursory analysis adds little to the law on this subject, and the fact that the pilots on whose behalf EEOC intervened will obtain full relief from TWA because ADEA defendants are jointly and severally liable for violating the Act. See *Secretary of Labor v. Crown Central Petroleum Corp.*, 90 F.R.D. 99, 101-102 (E.D. N.Y. 1981) (FLSA); *Dunlop v. Beloit College*, 411 F. Supp. 398, 402 (W.D. Wis. 1976) (Equal Pay Act). See also 3A *Moore's Federal Practice* para. 19.07 [1] at 19-111, para. 19.11 at 19-233 to 19-234 (2d rev. ed. 1982); W. Prosser, *Law of Torts* 296-297 (4th ed. 1971).

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,

Petitioner,

—v.—

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A.
PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**REPLY BRIEF IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-997

TRANS WORLD AIRLINES, INC.,

Petitioner,

—v.—

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A.
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
 TO THE UNITED STATES COURT OF APPEALS
 FOR THE SECOND CIRCUIT

**REPLY BRIEF IN SUPPORT OF PETITION
 FOR A WRIT OF CERTIORARI**

The opposing briefs support, rather than rebut, the reasons advanced by TWA in support of its petition. Nothing said in the opposition briefs derogates from the significance of the legal issues raised in the petition and the need for resolution of these issues by this Court.

I. THERE SIMPLY CAN BE NO DISPUTE THAT THE CIRCUIT COURTS ARE OPENLY SPLIT AS TO WHAT IS THE APPROPRIATE STANDARD FOR "WILLFULNESS" UNDER THE ADEA

The *Thurston* plaintiffs virtually acknowledge there is a conflict among the Circuits when they state that the Circuits "do not differ *materially* in their interpretation of 'willfulness.'" (Br., p. 7).^{*} Certainly, the Circuits *themselves* have recognized both the conflict and its significance. For example, the Seventh Circuit in *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 154 (7th Cir. 1981), specifically said that the "courts of appeals have reached divergent interpretations of the term." Moreover, what was viewed as necessary for "willfulness" by the Seventh Circuit in *Syvock* was "recently rejected" by the Fourth Circuit in *Crosland v. Charlotte Eye, Ear and Throat Hospital*, 686 F.2d 208, 217 (4th Cir. 1982).

Such disarray is similarly recognized by other Circuits. In *Kelly v. American Standard, Inc.*, 640 F.2d 974, 980 n. 7 (9th Cir. 1981), the Ninth Circuit specifically "decline[d] to extend the punitive provision of double recovery" to the standard in the Third Circuit that "reckless violations [of the ADEA] should also give rise to liquidated damages liability." The Ninth Circuit in *Kelly* also noted how the "good faith" defense by the Fifth Circuit in *Hays v. Republic Steel Corp.*, 531 F.2d 1307, 1311 (5th Cir. 1976), "was the only circuit case that had addressed this issue and the district courts were split." (640 F.2d at 981). The Ninth Circuit then rejected *Hays* and agreed with the decision by the First Circuit in *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020 (1st Cir. 1979), "that the good faith defense to liquidated damage recovery is not applicable in ADEA actions." (940 F.2d at 982).^{**}

^{*} Emphasis is added unless otherwise noted.

^{**} The *Thurston* plaintiffs assert that the First Circuit's decision in *Loeb v. Textron* "did not specifically construe 'willfulness' in the context of the ADEA." (Br., p. 8). That is certainly not the interpretation of *Loeb* by other Circuits which have discussed the case. See, e.g., *Syvock, supra*, 665 F.2d at 154; *Kelly, supra*, 640 F.2d at 981-82.

All of this is not the kind of harmony among the Circuits suggested by the *Thurston* plaintiffs and the EEOC. As Judge Weinfeld of the Southern District of New York has noted, the confusion instead reflects how the Circuits "differ as to the interpretation of the term." *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1165 n. 24 (S.D.N.Y. 1983). It is also something which the commentators are discussing with increasing frequency. See, e.g., 68 Iowa L. Rev. 333, 336 (1983) ("[N]o single standard for determining willfulness under the ADEA liquidated damages provision has been agreed on by the courts. Discrepancies have arisen among the circuits regarding what constitutes a willful violation of the ADEA"); 24 B.C.L. Rev. 47, 162 (1982) ("The courts have reached divergent interpretations of the term").

It is obvious this conflict is more than just the "semantic variation" alleged by the *Thurston* plaintiffs (Br., p. 7). There exists a clear need for this Court to establish a uniform rule removing the confusion and disarray among the Circuits, and this case is an excellent vehicle to resolve the issue.^{*}

^{*} The suggestion by the *Thurston* plaintiffs (Br., p. 10) that "the ultimate conclusion [would] be the same" here under any standard of "willfulness" is simply wrong. The requirement in the First and Seventh Circuits of actual intent to violate the law, *Loeb, supra*, 600 F.2d at 1020 n. 27, and *Syvock, supra*, 665 F.2d at 155, is not met here. There is no suggestion in the Second Circuit's decision that TWA specifically intended to violate the law. To the contrary, the Second Circuit inferred discriminatory intent merely from TWA's adoption of its "age 60" policy (A-24).

Moreover, even if the *Thurston* plaintiffs were not wrong, this Court certainly has reviewed questions not necessary to the outcome of a case. See, e.g., *United States v. Philadelphia National Bank*, 374 U.S. 321, 350 n. 26 (1963); *United States v. United States Gypsum Co.*, 333 U.S. 364, 387 (1948).

II. THE LEGAL ISSUE OF UNION LIABILITY FOR BACK PAY UNDER THE ADEA REMAINS AN IMPORTANT QUESTION OF FEDERAL LAW WORTHY OF THIS COURT'S CONSIDERATION

ALPA's detailed discussion of what it perceives are the "facts" of this case is a vain effort to obfuscate the clear legal issue presented in TWA's petition: whether a union can be jointly liable with an employer for back pay liability when both have been found to have violated the ADEA. This presents an important question of federal law involving a statute of increasing significance for employers, employees and unions alike.*

Indeed, ALPA implicitly admits that the issue is worthy of this Court's consideration when it says there is a "fundamental question of an employee's rights under § 7(b) of the ADEA" (Br., p. 17). While ALPA argues that the "issue should be determined in a case in which an *employee* has a direct stake in labor organization monetary liability" (Br., pp. 17-18) (emphasis in original), that claim is simply a red herring.** TWA's basic question remains whether an employer should be stuck with total monetary liability when the "statutory prohibitions" in the ADEA are even conceded by ALPA to apply to a union (Br., p. 29). It therefore is not just "abstract statutory 'purposes'" (ALPA Br., p. 15) which TWA is discussing but rather the ADEA's clear "statutory prohibitions" applicable to both employer and union alike. The plaintiff employees here have as much of a "direct stake" in the outcome of the issues as they would in any other case challenging an action by both employer and union.

In fact, despite ALPA's suggestion to the contrary (Br., pp. 34-35), there are myriad situations wherein both the employer

* It is also one on which both the *Thurston* plaintiffs (Br., p. 10) and the EEOC (Br., p. 18) agree that TWA is right.

** Later in its brief, ALPA repeats the same mistake when it says TWA's position "will not result in any benefit to plaintiffs in this action." (Br., p. 32).

and the union will be challenged under the ADEA. For example, in addition to the collective bargaining context noted in TWA's petition (p. 17),* a district court recently held that an EEOC interpretation allowing age restrictions on apprenticeship programs was unlawful. *Quinn v. New York State Electric and Gas Corp.*, 569 F. Supp. 655 (N.D.N.Y. 1983). If adopted elsewhere, all age-restrictive apprenticeship programs (so often the product of union and employer negotiations) are fair game for attack. Yet, under the decision below, only the employer faces monetary liability. The same unfair result will continue unless this Court clarifies whether Congress intended to insulate unions from such monetary liability.**

* Any suggestion by the EEOC (Br., pp. 3-5) that requiring Captains to bid for a Flight Engineer vacancy was not the normal procedure for changing status under the contract is simply wrong. TWA's bidding requirements were upheld by an arbitrator as in full accord with the Working Agreement (ALPA Br., B-13 to B-19). The arbitrator was Harry T. Edwards, who is now a member of the United States Court of Appeals for the District of Columbia Circuit.

** It is frivolous for ALPA (Br., p. 33) and the *Thurston* plaintiffs (Br., p. 11) to suggest that TWA is somehow barred from raising the question of union liability for back pay simply because TWA did not file a cross-claim against ALPA. This is not a case of contribution since, unlike the situation in *Northwest Airlines, Inc. v. TWU*, 451 U.S. 77 (1981), the union is a *co-defendant* with TWA. It is also inapposite for ALPA to claim in its brief (p. 23 n.) that courts have refused to read *Hodgson v. Sagner, Inc.*, 326 F. Supp. 371 (D. Md. 1971), *aff'd sub nom. Hodgson v. Baltimore Regional Joint Board*, 462 F.2d 180 (4th Cir. 1972), as support for an employer's right to contribution against unions. In *Sagner*, as here, the union was a *co-defendant* with the employer, and both were held liable for money damages under the Equal Pay Act, 29 U.S.C. § 206 (326 F. Supp. at 373-74).

Finally, even if a cross-claim were necessary against ALPA, Rule 15(b) of the Federal Rules of Civil Procedure permits an amended pleading "even after the judgment." Rule 15(a) further specifies that leave to amend "shall be freely given," and "this mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1963). "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of mere technicalities." (*Id.* at 181).

III. NO ONE DISPUTES THE BROAD RAMIFICATIONS OF THE LIABILITY STANDARD ADOPTED BY THE SECOND CIRCUIT

Significantly, no one challenges TWA's assertion in its petition (p. 17) that the "ramifications of the majority's basis for liability are enormous" for all employers. TWA's warning therefore continues to bear urgency: every time employers give a benefit for a non-age reason, they now live in fear that other employees will claim they are entitled to the same benefit simply because of their age (Petition, pp. 18-19).

This Court should consider whether that is what is mandated by the ADEA—particularly in view of its legislative history and the discussion by the other two Circuits which have considered how far employers must go in accommodating employees because of their age (Petition, pp. 19-20). The holding below transcends the facts of this case, and it should be addressed by this Court before it is adopted by other Circuits.*

* If TWA's petition is granted on the issue of liability, it can address at that time the question of whether TWA treated everyone equally, as it believes; or whether TWA "imposed extra-contractual rules on sixty year olds alone," as asserted by the *Thurston* plaintiffs (Br., p. 11 n. 18). Either way, the principle established in the decision below is so great for employers and employees alike that it should be considered by this Court in any event.

In this regard, it should be noted that unlike all the other eight airline "age 60" cases cited by the EEOC (Br., p. 8 n. 6), TWA was the *only* airline which voluntarily adopted a policy of allowing Captains to serve as Flight Engineers beyond age 60. Ironically, as Judge Van Graafeiland noted in his dissent, "[i]nstead of receiving commendation for what it has done, TWA is held liable as a matter of law for age discrimination." (A-36).

Respectfully submitted,

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HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A.
PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION and AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

v.

TRANS WORLD AIRLINES, INC.

(ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT)

**MOTION OF UNITED AIR LINES, INC.
FOR LEAVE TO FILE BRIEF AMICUS CURIAE**

and

**BRIEF AMICUS CURIAE OF
UNITED AIRLINES, INC.**

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A.
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**MOTION OF UNITED AIR LINES, INC.
FOR LEAVE TO FILE BRIEF AMICUS CURIAE**

**THE NATURE OF UNITED AIR LINES, INC.'S.¹
INTEREST**

United Air Lines Inc. ("United") operates the largest
airline in the United States and has a direct interest in the

¹ United Air Lines, Inc. is a corporation, and its parent corporation is UAL Inc. with offices at 1200 Algonquin Road, Elk Grove, Illinois 60666.

holding this Court will make, relevant to the first question to be disposed of under the petition for certiorari of Trans World Airlines, Inc. ("TWA"), as to what constitutes a "willful" violation of the Age Discrimination in Employment Act ("ADEA"). (29 U.S.C. § 621-634.) This interest arises because of the following facts.

United and the Air Line Pilots Association, International ("ALPA"), were sued by 112 plaintiffs in the United States District Court for the Northern District of Illinois for violating the ADEA because of United's policy which has required "Second Officers" (flight engineers who are required by United to be pilot trained) to retire at age 60. There were two classes of plaintiffs. The *Monroe* plaintiffs were Second Officers who wished to continue employment after age 60. The *Higman* plaintiffs were Captains or First Officers (pilots charged with flying the aircraft) who wished to "downbid" to Second Officers, using their seniority to "bump" active flight engineers,² because they could no longer serve as pilots or co-pilots after age 60 under an industry-wide FAA safety rule. (14 C.F.R. § 121.383(c).)

Among the defenses asserted by United was that being under age 60 was a bona fide occupational qualification ("BFOQ") for all members of the cockpit crew, pilots and flight engineers alike, under 20 U.S.C. § 623(f)(1). United's evidence showed that in 1960 it had established the policy that all crew members must retire at age 60 for safety reasons. This was seventeen years before the ADEA was enacted, and nine years before the FAA adopted the rule prohibiting Captains and First Officers from serving after age 60 for safety reasons. Prior to an April 6, 1978 amendment, United was permitted to retire crew members at age 60 under its pension plan. *United Air Lines v. McMann*, 434 U.S. 192 (1977). After the pension

² Under United's agreement with ALPA, Captains and First Officers could not downbid to Second Officers before or upon reaching 60, and "career" Second Officers had to retire at age 60 under United's under-60 cockpit rule.

plan exemption was repealed by Congress, United continued its age 60 policy as to Second Officers for what it continued to perceive as reasons of safety.

The case was tried before a jury which returned verdicts in favor of all 112 plaintiffs. United was also found guilty of a willful violation, and double damage judgments were entered totalling \$18,092,637.62. The District Court had instructed the jury that a violation was willful "if the unlawful action taken is knowing and voluntary, and United knew or reasonably should have known that its actions violated the ADEA." This instruction followed a test laid down by the Court of Appeals for the Seventh Circuit in *Syvock v. Milwaukee Boiler Mfg. Co., Inc.*, 665 F.2d 149, 155 (C.A. 7, 1981). The jury's finding of willfulness as to both classes of plaintiffs was sustained by the District Court.

The trial judge said that United "would also know" that a prior decision of another judge, denying plaintiffs a preliminary injunction because they had no "reasonable probability of ultimate success on the merits", had been "erroneous" and that United's failure to modify its collective bargaining agreement when it knew or should have known that it was violating the ADEA (as the jury subsequently decided) also showed willfulness. (32 F.E.P. cases 1256, at 1257 and fn. 2).

United and ALPA have appealed the judgments to the United States Court of Appeals for the Seventh Circuit. (Docket Nos. 83-1245, 83-1273, 83-1305, 83-1498). That Court presently has these appeals under advisement.

Consent to the filing of a brief amicus curiae by United Air Lines, Inc., has been refused by a party to this case.

**REASONS FOR BELIEVING THAT THE
WILLFULNESS ISSUE WILL NOT BE ADEQUATELY
PRESENTED BY THE PARTIES.**

United has discriminated because of age but has asserted a BFOQ defense as to all plaintiffs.³ "An age-related BFOQ permits an employer to admit that he has discriminated on the basis of age, but to avoid any penalty." *Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588 (C.A. 5, 1978). Since United "voluntarily" and "knowingly" adopted its age 60 policy in the 1950s, it is United's position that the issue of willfulness as applied to a BFOQ defense must necessarily involve factors other than "knowing" and "voluntary" action; otherwise, the BFOQ defense automatically results in a willful violation if the BFOQ defense is not accepted.

TWA is not raising a BFOQ defense in this Court⁴ and therefore the question of willfulness is posed—and may be considered by this Court—in a context which fails to consider the important situation of the application of the willfulness issue to a BFOQ defense. In short, under the questions presented by the TWA petition (No. 1; pp. 9-12), were willfulness to be established by a simple showing of specific intent, then when any BFOQ defense fails the violation will be perforce equated with a willful violation, although the statute clearly intends to distinguish between the two.

TWA's certiorari petition demonstrates considerable conflict and confusion in the lower courts as to the proper definition of "willful" in an action under the ADEA.⁵ However, no

³ United's trial resulted in an evidence transcript of about 7,000 pages, much of it medical, and hundreds of exhibits, addressed to the question whether age 60 is a justifiable age at which, for reasons of public safety, to exclude flight personnel from operating in the cockpit of a jet airliner.

⁴ It was raised by ALPA in the Court of Appeals but that Court held *inter alia* that it lacked jurisdiction to entertain ALPA's claim. 32 EPD ¶ 33,757, pp. 30,634-6.

⁵ This confusion and conflict is even greater than TWA's petition indicates. See: 55 ALR Fed. 604: "Award of Liquidated Damages Under § 7 of Age Discrimination In Employment Act of 1967 (29 USC § 626) For 'Willful' Violations Of The Act."

reported case, so far as United is aware, has considered under what circumstances a violation is "willful" when, as in United's case, there is intentional age discrimination that is claimed to be justified under the BFOQ defense; also, whether compliance with a collective bargaining agreement containing an age-neutral bona fide seniority system constitutes a reasonable factor other than age defense to a charge of "willfulness."

Because United apprehends that "intentional" age discrimination may be erroneously equated with "willful" age discrimination under the presentation made by TWA, it wishes an opportunity to state its views to the Court respecting the interpretation that should be given to the word "willful" in ADEA cases, lest the Court formulate a rule which fails to treat the particular situation of an age-based policy with the special consideration it requires.

WHEREFORE, it is requested that this Court grant leave to United Air Lines, Inc. to file the Brief *amicus curiae* which accompanies this motion.

Respectfully submitted,

EDWARD L. FOOTE,

*Counsel of Record for
United Air Lines, Inc.*

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Nos. 83-997, 83-1325 (Consolidated)

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BRIEF AMICUS CURIAE OF
UNITED AIRLINES, INC.

THE INTEREST OF UNITED IN THIS CASE.

The interest of United Air Lines, Inc. ("United") in this case is set forth in the motion for leave to file this Brief. In sum, a judgment of over \$18,000,000, including \$9,000,000 resulting from a determination of "willfulness," has been entered against United in the United States District Court for the Northern District of Illinois. The appeal from this judgment is now under advisement by the United States Court of Appeals for the

Seventh Circuit. One of the issues urged is that United had in no event willfully violated the Age Discrimination in Employment Act ("ADEA"), but had, long before the ADEA and in the interest of public safety, adopted an under-60 rule as a bona fide occupational qualification ("FBOQ") for every person (Captain, Co-Pilot and Flight Engineer) in the cockpit of its jet liners, similar to the industry-wide rule subsequently adopted by the FAA which forbids the Captain and Co-Pilot from being over 60 years of age.

United is, thus, acutely interested in the ruling which this Court may make in respect to the first question presented by the petition for certiorari of Trans World Airlines Inc. ("TWA") relating to the meaning of a "willful" violation of the ADEA.

SUMMARY OF ARGUMENT.

If, on the basis of substantial medical evidence, an employer reasonably believes that unpredictable physically disabling events happen to personnel more frequently with increasing age, and if the duties of the personnel involved relate entirely to the safety of the public, then the adoption of an express age-based retirement rule should not subject the employer to punitive double recovery, even though a trier of fact may ultimately decide in favor of plaintiffs despite the defense that the age specified is a valid occupational qualification.

The general test of "willfulness" under the ADEA, which can henceforth serve all varieties of cases arising under the Act, should require a finding of *deliberate disregard of the law with the purpose to evade its known requirements*.

ARGUMENT.

This Court should not adopt a definition of "willful" under the ADEA that would permit the finder of fact to find that an intentional age-based policy constituted a "willful" violation of the Act even though the employer had a reasonable and good faith belief that the policy was an occupational qualification.

The certiorari petition of TWA shows that the lower courts have adopted various standards to determine "willfulness" under the ADEA. *Inter alia* it urges a test found in the opinion of the Seventh Circuit Court of Appeals. It quotes at page 10 that "a finding of willfulness should lie *only* if there is some showing as to the defendant's *knowledge of the illegality* of his actions." *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 155 (C.A. 7, 1981). But the sentence which the petition quotes is followed by the sentence:

"We hold that, in order to prove willfulness under (29 U.S.C. § 626(b) (1976)), a plaintiff must show that the defendant's actions were knowing and voluntary and that he knew or reasonably should have known that those actions violated the ADEA."

This latter is the instruction which was given the jury in the case against United and on the basis of which a finding of "willful" violation was made.

Such a test, or a comparable one, is easily subject to misinterpretation by a jury or the lower courts. The "reasonably should have known" alternative cancels out the test of knowing and deliberate violation, stated in the preceding sentence, and, in effect, permits a negligence test. (*E.g., Orzell v. City of Wauwatosa Fire Department*, 697 F.2d 743, 759 (C.A. 7, 1983), *cert. den.* 11/28/83, Docket No. 83-205—"reasonably should have known.") "'Should know' indicates that the actor is under a duty to another to use reasonable diligence to ascertain the existence or non-existence of the fact in question and that he would ascertain the existence

thereof in the proper performance of that duty." *Restatement of the Law of Torts (2d)*, § 12.

Many of the tests formulated by some of the lower courts are implicitly, and sometimes explicitly, based on the following reasoning: Everyone is charged with knowing the law; what the defendant did, it did intentionally; therefore, if it violated the Act, it "willfully" violated the Act. The practical result of many decisions in the lower courts is to make a doubling of recovery almost automatic, once a violation has been shown.

Although any test that this Court may lay down is capable of being misinterpreted or wrongfully applied by a court or jury, the *Syvock* test led to a finding of willfulness by a jury in *United's* case that was sustained by the District Court notwithstanding: (a) that *United's* age 60 policy preceded the ADEA by seventeen years and the FAA's own age 60 rule for Pilots and Co-Pilots by nine years; (b) that a district judge had denied a preliminary injunction on the grounds that plaintiffs probably would not prevail at a trial in showing a violation of the Act; and (c) that *United* was barred from transferring the pilot plaintiffs down to Second Officers (Flight Engineers) by its age-neutral collective bargaining agreement with Air Line Pilots Association, International ("ALPA"). Because *United's* policy was expressly based on age, it was undeniably intentional, and this sufficed to make it "willful" for purposes of punitive double recovery.

This Court has stated that "willful" "is a word of many meanings, its construction often being influenced by its context" (*Spies v. United States*, 317 U.S. 492, 497 (1943)) and has discussed the meaning of the word "willful" several times in criminal cases.

In *Fountain v. United States*, 96 U.S. 699, 702 (1877) and *Spurr v. United States*, 174 U.S. 728, 734 (1899), this Court quoted from authorities which stated that the word "willful" "in the ordinary sense in which it is used in statutes means not

merely 'voluntarily but with a bad purpose' " and that the word is frequently understood "as signifying an evil intent without justifiable excuse." See also, *Potter v. United States*, 155 U.S. 438, 446 (1984) (willful " 'implies knowledge and a purpose to do wrong' "); *United States v. Pomponio*, 429 U.S. 10, 12 (1976) ("willfully" filing a false income tax return means "an intentional violation of a known legal duty"); *Hertzel v. United States*, 322 U.S. 680, 686 (1944); *Crews v. United States*, 325 U.S. 91, 101 (1945); *Morissette v. United States*, 342 U.S. 246, 264 (1952); *Heikkinen v. United States*, 355 U.S. 273, 279 (1958).

Only once, so far as we can ascertain, has this Court considered the meaning of "willful" in a civil action. In *United States v. Illinois Central Ry. Co.*, 303 U.S. 239, 243 (1958), it was said that the word "means purposely or obstinately and it is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements."*

The word "willful" is not defined in the ADEA. Moreover, "A review of the legislative history of the ADEA and its assimilated acts uncovers nothing helpful on [the question of willfulness.]" *Wehr v. Burroughs Corp.*, 619 F.2d 276, 282 (C.A. 3, 1980).**

* At least one Court of Appeals has applied a "deliberate flaunting of the Act" test for a "willful" violation of the Occupational Safety and Health Act (OSHA). (29 U.S.C. § 666; 29 U.S.C. § 651 et seq.) *Frank Irey, Jr., Inc. v. OSHA*, 519 F.2d 1200, 1207 (C.A. 3, 1974) *aff'd en banc* 519 F.2d 1215 (C.A. 3, 1975) *aff'd on other grounds*, 430 U.S. 442 (1977).

** The House Report merely repeats the words of the statute. H.R. No. 805 to accompany H.R. 13054, U.S. Code Congressional and Administrative News, 90th Cong. 1st Sess. (1967) Vol. 2, pp. 2218, 2222.

Similarly, Congress, in passing the 1978 amendments, threw no light on the meaning of "willful." It stated, "[ADEA] includes

(Footnote continued on following page)

The word "willful", however it may be defined by this Court, should be given a definition that will accommodate the defenses permitted under the ADEA and utilized in good faith by the employer and which will not automatically permit a finding of "willful" violation if the trier of fact* fails to regard the defenses as having been proven.

United's BFOQ defense based on the policy that no one over 60 years of age should be an active member of the cockpit crew of a jet liner is just such a defense. (29 U.S.C. § 623(f)(1).)

Also, United asserted a reasonable factor other than age ("RFOA") defense under 29 U.S.C. § 623(f)(2), that the bona fide seniority system established by its collective bargaining contract with ALPA barred all "downbidding" (with only a few, non-age related exceptions), including to Second Officer status by Captains and Co-Pilots who seek, after their age 60, to use their seniority to "bump" active Second Officers. Any such practice would be a breach of a labor contract which was age-neutral in all its provisions. Yet the trial judge in *United's* case upheld the jury finding of willfulness because he considered it "willful" for United not to have modified its collective bargaining contract.

Obviously, Congress, in providing for double damages for "willful" violation, intended to create two classes of violators, one "willful" and the other "non-willful." An age policy is necessarily adopted with specific intent to discriminate on the basis of age, but the act permits such a policy if it can be justified as of a bona fide occupational qualification. If the trier of fact finds that the policy meets this requirement, there is, of

(Footnote continued from preceding page)

liquidated damages" (calculated as an amount equal to the pecuniary loss) "which compensate the aggrieved party for nonpecuniary losses arising out of a willful violation of the ADEA." H. Cong. Report No. 95-950, 95th Cong. 2d, Sess. 13 (1978). Reprinted in Volume 3 U.S. Code Congressional and Administrative News, p. 528 at 535.

* There is a right to jury trial in ADEA cases. 29 U.S.C. § 626(c)(2).

course, no liability. But the trier of fact may also find that such a policy, even though adopted and continued in good faith, and without a bad purpose or a plain indifference to the law, is not an occupational qualification sufficiently proven to deny all recovery to plaintiffs. This should not automatically subject the employer to double damages.

CONCLUSION

The word "willful" in the ADEA should be defined by this Court in such a way as to preclude a trier of fact from finding a "willful" violation merely because an age policy was intentionally adopted, if the trier further finds that the age policy was adopted by the employer in the good faith belief that being under a certain age is a reasonable occupational qualification for the job involved or that age-neutral contract provisions preventing job-change down-bumping by anyone (including persons legally disqualified for one job after a certain age) must be adhered to.

The definition already laid down by this Court in *United States v. Illinois Central R.R. Co.*, 303 U.S. 239, 243 (1958) would have this effect and would not only encompass the 'knowledge of illegality' test urged by TWA but also constitute an unambiguous general rule for application in all ADEA cases.

Respectfully submitted,

EDWARD L. FOOTE,

*Counsel of Record for
United Air Lines, Inc.*

FILED

MAY 17 1984

ALEXANDER L. STEVAS.
CLERK

IN THE
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OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,

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—v.—

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AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

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ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF TRANS WORLD AIRLINES, INC.

Petitioner in No. 83-997

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QUESTIONS PRESENTED

1. Whether the Age Discrimination in Employment Act requires an employer to accommodate employees for an age-related reason merely because it provides accommodation for non-age-related reasons?

2. Whether specific intent to discriminate is necessary to establish a "willful" violation under the Age Discrimination in Employment Act?

3. Whether a labor union which jointly violates the Age Discrimination in Employment Act with an employer is absolved as a matter of law from liability for back pay?

PARTIES

Trans World Airlines, Inc., Harold H. Thurston, Christopher J. Clark, C.A. Parkhill and the Air Line Pilots Association, International are parties to the decision sought to be reviewed here. In addition, the Equal Employment Opportunity Commission and Nicholas Vasilaros, *et al.*, were intervenors in the court below.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-997, 83-1325

TRANS WORLD AIRLINES, INC.,

Petitioner,

—v.—

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A.
PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

—v.—

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A.
PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and TRANS WORLD AIRLINES, INC.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF TRANS WORLD AIRLINES, INC.

Petitioner in No. 83-997

Respondent in No. 83-1325

PRELIMINARY STATEMENT

Trans World Airlines, Inc. ("TWA"),¹ petitioner in No. 83-997 and respondent in No. 83-1325, respectfully submits this brief on the merits in these consolidated cases.²

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 713 F.2d 940 and appears in the appendix to TWA's petition for certiorari in No. 83-997 at page A-1. The opinion of the United States District Court for the Southern District of New York is officially reported at 547 F. Supp. 1221 and appears in the same appendix at page A-44.

JURISDICTION

This Court's jurisdiction exists by virtue of 28 U.S.C. § 1254(1). TWA petitioned this Court for a writ of certiorari in order to review the judgment and opinion of the United States Court of Appeals for the Second Circuit. The Air Line Pilots Association, International ("ALPA") subsequently filed a conditional cross-petition. Both petitions were filed within 90 days of the denial of rehearing by the Court of Appeals. TWA's petition was granted on February 27, 1984 (52 U.S.L.W. 3631), and ALPA's petition was granted on April 2, 1984 (52 U.S.L.W. 3720).

STATUTES AND REGULATIONS INVOLVED

Section 4(a) of the Age Discrimination in Employment Act ("ADEA") provides (29 U.S.C. § 623(a)):

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with

¹ TWA has no parent, subsidiary or affiliate required to be reported under Rule 28.1 of this Court. Effective February 1, 1984, TWA was divested from Trans World Corporation.

² Cases No. 83-997 and No. 83-1325 were consolidated pursuant to an order of this Court entered on April 2, 1984 (52 U.S.L.W. 3720).

respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

Section 4(c) of the ADEA provides (29 U.S.C. § 623(c)):

It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Sections 4(f)(1) and (2) of the ADEA provide (29 U.S.C. §§ 623(f)(1) and (2)):

It shall not be unlawful for an employer, employment agency or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual.

Section 7(b) of the ADEA provides (29 U.S.C. § 626(b)):

The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217), and subsection (c) of this section. Any act prohibited under section 4 of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 215). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216, 217): *Provided*, That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

Section 12(a) of the ADEA provides (29 U.S.C. § 631(a)):

The prohibitions in this Act shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

Part 121.383(c) of the Federal Air Regulations provides (14 C.F.R. § 121.383(c)):

No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.

STATEMENT OF THE CASE

A. The Origin of the Case

This case has its genesis in the passage of the 1978 amendments to the ADEA that were signed into law on April 6, 1978. Pub. L. No. 95-256, 92 Stat. 189. These amendments prohibit, *inter alia*, an employee's involuntary retirement before the age of 70 by reason of a bona fide employee benefit plan.³ The ADEA, however, still allows retirement before the age of 70 where:

(1) "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business;"

³ Prior to the 1978 amendments, the ADEA had been interpreted to permit mandatory retirement at an age earlier than the statutory minimum of 65 if this was part of a bona fide employee benefit plan (such as a retirement, pension or insurance plan) and was not a subterfuge to evade the purposes of the ADEA. See *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977). TWA's Retirement Plan is such a bona fide plan (J.A. 242, ¶ 5).

References to "J.A. ____" are to the Joint Appendix filed in the Second Circuit and part of the record below. By order dated March 19, 1984 (52 U.S.L.W. 3687), this Court granted the parties' motion to dispense with printing a new joint appendix, and all the parties have agreed to cite to the Joint Appendix below.

(2) "where the differentiation is based on reasonable factors other than age;" or

(3) where the retirement is in accordance with (i) "the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance plan;" (ii) is "not a subterfuge to evade the purposes of [the ADEA];" and (iii) is not as a result "of the age of [the] individual." (29 U.S.C. § 623(f)).

Because of these amendments, TWA began a review of its pilot collective bargaining agreement (which includes the pilot Retirement Plan) in order to ensure that the Company was complying with the new statute. Section 4.1 of the Retirement Plan provides that the "normal retirement date" for a pilot is his 60th birthday, and Section 4.2 says that pilots "must retire by their normal retirement date unless written approval of the Company is granted for continuance in employment." (J.A. 242, ¶¶ 4, 6; J.A. 410).

These two provisions have been in the Retirement Plan for many years, and at the time of the 1978 ADEA amendments, no one had served in a TWA cockpit beyond the age of 60 for at least two decades (J.A. 243, ¶ 7). Insofar as Captains and First Officers (co-pilots) are concerned, a regulation of the Federal Aviation Administration ("FAA") requires that "[n]o person may serve as a pilot . . . if that person has reached his 60th birthday" (14 C.F.R. § 121.383(c)). All parties agree that such an age limitation is a "bona fide occupational qualification" ("BFOQ") for the purposes of the ADEA (A-7 to A-8).⁴

However, on most jet aircraft, there is also a Flight Engineer who "is primarily responsible for pre-flight inspection and in-flight monitoring of the mechanical, electrical and electronic functioning of the aircraft." (A-6).⁵ There is no FAA regulation

⁴ References to "A—" are to the decisions below which appear in the appendix to TWA's petition for certiorari filed December 16, 1983.

⁵ On a few long flights, TWA also has an International Relief Officer ("IRO"). An arbitrator has ruled that an IRO essentially "relieves the Flight Engineer" (J.A. 607), although he can perform limited First Officer functions (J.A. 351, ¶ 2).

limiting that position to persons below the age of 60 (A-7). TWA therefore had to determine whether, in light of the 1978 ADEA amendments, Flight Engineers remained subject to mandatory retirement at age 60 (J.A. 243, ¶ 10).

B. TWA's Corporate Policy and the Subsequent Lawsuits

As part of its examination of the age 60 question, TWA met on several occasions with ALPA, the union representing all of TWA's flight crewmembers and the union with which TWA has a collective bargaining agreement ("Working Agreement").⁶ It was clear from these meetings, however, that significant differences separated the parties (J.A. 243, ¶ 11). ALPA took the position that allowing anyone to serve in the cockpit beyond age 60 was not permitted under the Working Agreement and was not mandated by the ADEA. TWA contended that, as to Flight Engineers, service beyond age 60 was required by the new law (J.A. 1046-47, 1050-51).

On August 10, 1978, TWA finalized its position on the ADEA amendments and formally announced its corporate policy (J.A. 425). That policy was set forth in a telex posted for all TWA flight personnel (J.A. 243-44, ¶ 12). The bulletin stated that "any cockpit crew member who [was] in a Flight Engineer status at age 60 may not be compelled to retire." The policy also announced that those who wanted to work beyond age 60 would "be governed by the provisions of the current Working Agreement . . ." (J.A. 425). TWA thereby became the only trunk airline which voluntarily permitted former Captains to serve as Flight Engineers past age 60 (J.A. 487-88; 492, No. 12).

On the same day that TWA announced its policy, ALPA filed

⁶ Excerpts from the 1977 and 1979 Working Agreements are included at J.A. 250-400. (Any change in the 1979 Agreement from the 1977 version is noted by a line on the side of the text.) A new Working Agreement was also signed in April 1982 (A-46 n.2). In the Working Agreement, the word "pilot" is often used to comprise all flight deck crewmembers, including Flight Engineers (A-6 n.6).

suit against the Company in *ALPA v. TWA*.⁷ The complaint alleged that TWA had gone too far by allowing anyone to serve in the cockpit past age 60. This was alleged to be a breach of the Working Agreement and a violation of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA") (J.A. 108-15).

Soon thereafter, several TWA Captains mandatorily retired at age 60 because there were no Flight Engineer vacancies prior to their 60th birthday also filed suit in *Thurston v. TWA and ALPA*. Their complaint alleged, *inter alia*, that TWA's "age 60" policy had not gone far enough to accommodate them and was therefore in violation of the ADEA (J.A. 58-73). The Equal Employment Opportunity Commission ("EEOC"), purporting to represent others similarly situated, intervened in *Thurston* as a plaintiff intervenor,⁸ and *Thurston* was consolidated with *ALPA* (J.A. 457-58).⁹

C. The Operation of TWA's "Age 60" Policy

The August 10, 1978 bulletin which announced TWA's "age 60" policy was posted at all pilot domiciles. The announcement informed the pilot work force that:

⁷ A group of "career" or permanent Flight Engineers, Nicholas Vasilaros, *et al.*, was permitted to intervene in *ALPA v. TWA* (A-49). Since they intervened on the side of the Company, they are not respondents here.

⁸ In view of this Court's recent decision in *INS v. Chadha*, ___ U.S. ___, 103 S. Ct. 2764 (1983), and the subsequent discussion in *EEOC v. Allstate Ins. Co.*, 570 F. Supp. 1224 (S.D. Miss.), *appeal filed*, 52 U.S.L.W. 3512 (Dec. 15, 1983), a threshold question arises whether the EEOC has the authority to enforce the ADEA. The issue was not considered below because briefs and oral arguments were completed prior to this Court's decision in *Chadha*. TWA reserves all rights in this regard in the event the case is remanded for further proceedings.

⁹ There was also consolidated at the same time a third case, *Cafferty v. TWA*. This case was originally brought in the Western District of Missouri by a group of TWA Flight Engineers at the bottom of the pilot seniority list. They alleged they had been furloughed because of TWA's policy of allowing Flight Engineers to serve beyond age 60. After their motion for a preliminary injunction was denied (488 F. Supp. 1076), the case was transferred to New York and was ultimately dismissed on August 28, 1981 (J.A. 451-53; 459-60). The plaintiffs did not appeal.

- (1) "It [was] the Company's opinion that [the ADEA] amendments became effective April 6, 1978;"
- (2) "Any cockpit crewmember who [was] in a Flight Engineer status at age 60 may not be compelled to retire;"
- (3) "The terms and conditions of employment for Flight Engineers who elect to work beyond age 60 [would] be governed by the provisions of the current Working Agreement;" and
- (4) "Flight Engineers [would] be subject to the provisions of the Federal Air Regulations applicable to TWA's operations and as such [could] not under any circumstances serve as a pilot after attaining age 60." (J.A. 425).

Subsequent to the posting of the bulletin, TWA sought to implement the policy as soon as possible. As the Second Circuit stated, "TWA immediately reinstated those who had been in flight engineer status on their 60th birthdays and had been retired after April 6, 1978. Flight Engineers reaching their 60th birthday after August 10, 1978 continued in that status." (A-9). Captains seeking to become Flight Engineers (and thereby avail themselves of an opportunity to work beyond age 60) could change their status to Flight Engineer "in accordance with the seniority and bidding procedures of the Working Agreement." (A-9).

The bidding procedures of the Working Agreement are the heart of the contractual seniority system and serve as the basic mechanism in deploying the pilot work force (J.A. 185, ¶ 3). The bidding procedures are outlined in Section 19 of the Working Agreement and apply to any TWA pilot, irrespective of age, who seeks to change status or location (domicile) (J.A. 185, ¶ 4).

In order to bid, a pilot normally files a "Standing Bid" showing his present status and domicile and listing his request (in order of preference) for a new status (J.A. 185, ¶ 5; 466). The Company is required under Section 19(C)(1) of the Working Agreement to "publish bulletins announcing vacancies

. . ." (J.A. 304). In such a bulletin (J.A. 470), the Company lists available vacancies on which pilots can bid, and vacancies are awarded in order of seniority (J.A. 185, ¶ 6).¹⁰ Depending on staffing needs, there may be vacancies for Captains, First Officers and Flight Engineers at all the pilot domiciles, or the vacancies may be limited to less than all the available statuses or domiciles (J.A. 185-86, ¶ 7). In virtually any bidding situation where there is a vacancy, certain pilots will be awarded their bids, and others will be denied their bids. In each instance, however, the selection process is based on a pilot's seniority, *i.e.*, the date of hire with the Company (J.A. 186, ¶ 8).

If a Captain wishes to downbid to Flight Engineer, he files a bid for a Flight Engineer vacancy. If there is such a vacancy at the domicile where a downbidding Captain has requested to be assigned and that Captain has the highest seniority, then he is granted the bid in accordance with the provisions of the Working Agreement (J.A. 186-87, ¶ 11).¹¹

As the Second Circuit recognized, "[m]ost of the 70 captains and first officers who have downbid for flight engineer positions successfully obtained that status before reaching 60." (A-10). Indeed, 83% of those Captains seeking to serve beyond age 60 have succeeded in that regard (A-61 n.8). In addition, there are over ninety "career" Flight Engineers who are serving or have served beyond age 60 (J.A. 189, ¶ 18).

D. Refinements to TWA's Policy

Since the adoption of TWA's policy, the procedure has remained essentially the same. Downbidding Captains bid for

¹⁰ Section 17(A)(3) of the Working Agreement specifically says that "[s]eniority shall govern all pilots in . . . their choice of vacancies, provided that the pilot's qualifications are sufficient for the operation to which he is to be assigned." (J.A. 294).

¹¹ A summary of the bidding procedure is contained in the district court's decision (A-48). The "seniority system and the bidding procedures have existed at TWA since before 1967" (A-48), *i.e.*, before the passage of the ADEA or its 1978 amendments.

Flight Engineer, and once the bid has been awarded, each Captain is notified by form letter of the training requirements for Flight Engineer (J.A. 473-74). Of particular importance is the need to take and pass the FAA Flight Engineer written exam which has always been a prerequisite for entering Flight Engineer training.

In January 1980, the Company adopted a procedure of sending a separate form letter informing a downbidding Captain of the date of his Flight Engineer class (J.A. 477). The letter also notified him that if he failed to have proof of successful completion, his Flight Engineer bid would be cancelled. If otherwise qualified, he could return to the Captain status where he would be eligible to bid for another Flight Engineer vacancy (J.A. 188-89, ¶¶ 16-17).¹²

At about the same time, the Company also required that Captains be trained, whenever possible, prior to the effective date of their Flight Engineer bids so that they could fulfill their Flight Engineer bids in a timely manner (A-10 n.9). Previously, the Company had often permitted downbidding Captains to be trained after the effective date of their bids. However, ALPA brought to the Company's attention that this resulted in favoring downbidding Captains over the rest of the pilot work force who were normally required to be trained in a timely fashion so as to fulfill their bids on the effective date. In order to treat everyone equally, therefore, the Company's policy was changed so "that downbidding Captains be trained just like the rest of the pilot work force" (J.A. 859, No. 12c.6; 1068-69).¹³

¹² This procedure, criticized by the majority below (A-12), is consistent with the Company's long-standing policy that if a pilot cannot qualify in a new status (in this case, Flight Engineer), then he reverts to his old status (in this case, Captain) (J.A. 188-89, ¶ 17). It was done to treat all pilots similarly situated in an equal fashion.

None of the current plaintiffs was impacted by this procedure. The two who alleged they were adversely affected by this procedure, W.T. Emrich and J.L. Clark (A-57 n.6), "have since settled" with TWA (A-10 n.10).

¹³ This change was also criticized by the majority below, particularly because of what it viewed as a premature reduction in pay for downbidding Captains (A-11 to A-12). However, the problem is exactly the converse: prior

(Footnote continued on following page)

E. Non-Age Accommodations in the Working Agreement

While the bidding procedures in the Working Agreement are the heart of the contractual seniority system, there are also some provisions in the contract to accommodate certain special circumstances unrelated to age. For example, a Flight Engineer who fails to qualify as a First Officer, or a First Officer who fails to qualify as a Captain, can revert to Flight Engineer without bidding for a vacancy. However, he "shall not thereafter be eligible to exercise a bid to a higher status." (Sec. 6(B)(16); J.A. 265-66). Similarly, a Captain who cannot maintain an FAA first class medical certificate is permitted to revert to Flight Engineer without a bid provided a second class medical certificate can be obtained (Secs. 19(A)(3) and (A)(4)(a); J.A. 302).¹⁴ In this instance, as in the previous one, the procedure is unrelated to age and applies to anyone similarly situated.

As discussed *infra*, pp. 17-18, such provisions apply just as equally to the plaintiffs as to anyone else. However, they pertain to limited situations. Particularly when viewed in the context of TWA's handling a 3,000 pilot work force every day (A-5 to A-6), the number utilizing such provisions is minute. For example, no more than two people have ever reverted to Flight Engineer as a result of the loss of a first class medical certificate (J.A. 968), and only 20 have ever reverted to Flight

to the change, Captains awarded Flight Engineer vacancies were obtaining a windfall in salary over their entitlement under the Working Agreement.

Even after the change, downbidding Captains have continued to receive the windfall of Captain's pay while in Flight Engineer training. This is because the Working Agreement requires that training pay be calculated on the basis of a pilot's prior two months' salary (Sec. 6(A)(2); J.A. 259). A downbidding Captain therefore receives more pay during Flight Engineer training than after training, but in order to apply the same pay formula to everyone equally, TWA pays its downbidding Captains in this fashion.

14 The Working Agreement says that "all pilots will be required to possess a first class medical certificate permitting the pilot to operate as pilot in command," *i.e.*, as Captain (Sec. 16(F); J.A. 292). The Federal Air Regulations specify the requirements for first class and second class medical certificates (14 C.F.R. §§ 67.13 and 67.15).

Engineer after failing to upgrade to the next higher status (J.A. 946-47).¹⁵

F. The Thurston and EEOC Plaintiffs

There are three named plaintiffs, H.H. Thurston, C.J. Clark and C.A. Parkhill, and seven other individuals represented by respondent EEOC (A-10 n.10). All are former TWA Captains, and as the Second Circuit recognized, all share one other crucial similarity: they "could not establish that there were flight engineer vacancies at the time they applied to transfer." (A-23). Since they could not remain in their Captain status beyond the age of 60 because of the FAA prohibition for "pilots," they were mandatorily retired.¹⁶

G. The Decisions Below

On the basis of these facts, the district court ruled that TWA's "age 60" policy complied with the RLA and dismissed

15 The majority's decision below also refers to the situation where "as a disciplinary measure in response to demonstrated incompetence" (A-11), TWA has transferred a pilot to a lower position for which he was qualified. This has occurred only once during the course of this litigation and involved a pilot who was already trained as a Flight Engineer and had "priority rights" (unrelated to age) to the Flight Engineer seat (J.A. 627-29, No. 7). None of the plaintiffs is covered by the 1962 Agreement providing for such "priority rights" (J.A. 616; 492, No. 11).

16 Their retirement dates were:

Name	Retirement Date
A. M. Lusk	May 2, 1978
L. D. Bobzin	May 9, 1978
H. H. Thurston	June 11, 1978
C.A. Parkhill	August 22, 1978
R. Gowling	August 27, 1978
C. J. Clark	September 19, 1978
T. H. Widmayer	November 10, 1978
A. T. Humbles	September 14, 1979
H. W. Lewis	November 24, 1980
D. V. Roquemore	August 21, 1981

Today, all receive benefits under the Retirement Plan. Through December 31, 1981, payments totalled around \$1,100,000. Each received during that period approximately \$40,000-\$45,000 per annum, and that amount increases each year (J.A. 889-90).

ALPA's complaint in *ALPA v. TWA* (A-50 to A-54). The court also granted TWA's motion for summary judgment in *Thurston* (A-54 to A-61). The court ruled that the plaintiffs "cannot establish a *prima facie* case of discrimination solely because no job vacancy existed at the time they applied and were eligible for the job. TWA was legally obligated to remove these pilots at age sixty under the FAA regulations. TWA was not obligated, however, to offer these ex-pilots jobs which did not exist. To the extent jobs existed, TWA was justified in relying upon a seniority bidding system." (A-57).

On appeal, the Second Circuit unanimously affirmed the district court's decision in *ALPA v. TWA* (A-13 to A-21). However, a majority of the panel reversed the district court's holding in *Thurston* and directed that summary judgment be entered in favor of the *Thurston* and EEOC plaintiffs. Judge Mansfield, in an opinion joined by the late Judge Waterman, held that "because TWA routinely accommodates other employees who seek to downgrade to flight engineer for non-age reasons and has failed to come forward with a permissible reason for its refusal to accord the same treatment to age-60 captains and first officers, the *Thurston* litigants and the EEOC claimants must prevail on their ADEA claim." (A-31).

In fashioning its relief against TWA, the majority ruled that TWA's actions constituted a "willful" violation under Section 7(b) of the ADEA, 29 U.S.C. § 626(b), thereby entitling plaintiffs to "[l]iquidated or double damages" (A-33). The court's finding of "willfulness" was predicated on its view that "in a case based on discriminatory treatment, such as the present one, plaintiffs need not prove a specific intent to violate the ADEA; it is sufficient to establish that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." (A-33). Significant liability for liquidated damages was thus imposed against TWA even though there had never been an evidentiary hearing on the issue of intent or "willfulness."

In its initial decision, the majority also imposed money liability against ALPA. It found that while the statute "pre-

cludes a monetary damage award against ALPA," the plaintiffs were "entitled to recover back pay, an equitable remedy, against the union." (A-34). However, in a subsequent "Errata Sheet" released after the denial of the petitions for rehearing (A-37 to A-39),¹⁷ the court deleted the entire paragraph relating to its prior holding that the plaintiffs were entitled to recover back pay from ALPA. This deletion resulted in making TWA, the employer defendant, solely liable for all payment of money under the court's ruling.

In dissent, Judge Van Graafeiland noted that the majority's attempt to compare TWA's treatment of its employees for non-age reasons with its treatment of the plaintiffs was "like comparing apples with oranges." He did not "believe" that was what "Congress intended" by its enactment of the ADEA (A-35 to A-36). He concluded:

"Apparently, TWA is the only trunk airline that voluntarily has permitted pilots over 60 to continue working as flight engineers. Instead of receiving commendation for what it has done, TWA is held liable as a matter of law for age discrimination." (A-36).

SUMMARY OF ARGUMENT

The majority below has adopted a standard for liability under the ADEA whereby every time an employer provides an accommodation for a non-age reason it may now have to provide such accommodation for an age reason. Such a basis for liability is contrary to Congressional intent and established precedent. By having Captains bid for Flight Engineer positions in the same manner as flight deck positions are normally filled under the seniority provisions of the collective bargaining agreement, TWA treats everyone equally. That is all the ADEA requires. It certainly does not dictate that plaintiffs may enjoy a virtual guarantee of a new position based on age simply

¹⁷ The actual "Errata Sheet" is printed at A-37, and the resulting changes in the decision are reflected in the markings made by TWA for the convenience of this Court at A-38 to A-39.

because, in very limited and different circumstances unrelated to age, they and the rest of the pilot work force might have received accommodations enabling them to obtain Flight Engineer positions.

The majority below further erred when it found that TWA's conduct was a "willful" violation under the ADEA, thereby entitling the plaintiffs to liquidated or double damages. Such a finding was made without any hearing and on the basis of admittedly inferred conduct. Indeed, in holding there was a "willful" violation here, the majority below adopted a standard whereby once there is a finding of discriminatory treatment, liquidated damages automatically follow. That is contrary to the clear Congressional intent to establish under the ADEA a two-tiered level of liability: one non-willful and one willful. The legislative history, sound reasoning and common sense dictate that a "willful" violation should only exist where a defendant actually *knew* it was violating the ADEA.

Finally, the majority erred when it found that a defendant union could not be jointly liable with an employer for money damages under the ADEA even though there was a finding of joint culpability. Holding unions liable for such damages would further the deterrent purpose of the ADEA and would be completely consistent with other national labor laws.

ARGUMENT

I. THE MAJORITY BELOW HAS ADOPTED A STANDARD FOR LIABILITY UNDER THE ADEA WHICH IS CONTRARY TO CONGRESSIONAL INTENT AND ESTABLISHED LAW

A. The Majority's Basis for Liability Is Predicated Upon a Misunderstanding as to What the ADEA Requires

The majority below held that "because TWA routinely accommodates other employees . . . for *non-age* reasons," it must "accord the *same* treatment to age-60 captains and first

officers . . ." (A-31).¹⁸ The majority is therefore apparently saying that every time an employer accommodates an employee for a non-age-related reason, it should have to provide the same accommodation to someone claiming such entitlement simply because of age.

Such reasoning inevitably creates a *new* right based on age. The plaintiffs not only get the same accommodations for non-age reasons as everyone else, but they now seek to enjoy these accommodations based on age. For example, the majority notes that a Captain unable to maintain a first class medical certificate is entitled to revert to Flight Engineer "without being required to bid for the downgraded position." (A-10). What the majority ignores is that the number of times this has ever occurred is no more than twice (J.A. 968). That is hardly the "routine" accommodation claimed by the majority (A-31). Moreover, any of the plaintiffs who had lost his first class medical certificate would have been just as entitled to revert to Flight Engineer without a bid, *supra*, p. 12. Yet the mere existence of such a procedure should not mean that the plaintiffs now acquire automatic reversion rights at age 60. That would be, as the dissent notes, "like comparing apples with oranges." (A-35 to A-36).¹⁹

¹⁸ Unless otherwise noted, emphasis in quotations is added.

¹⁹ The inappropriateness of such a comparison was also recognized by the arbitrator who decided the contractual grievance of plaintiff Thurston. While declining to rule on Captain Thurston's "legal" rights, the arbitrator specifically rejected the relevance of certain automatic downgrades (including the loss of a first class medical certificate) to the plaintiffs' situation here. "None of these provisions can be seen to have given Captain Thurston the right to *automatic* placement in a Flight Engineer position as claimed by grievant's counsel." (J.A. 530-31) (emphasis in original). The arbitrator, Harry T. Edwards, is now a member of the United States Court of Appeals for the District of Columbia Circuit.

In the same vein, the majority notes that a "jobless pilot who lacks sufficient seniority to displace is not discharged. Rather, he is placed on furlough status which may extend for up to 10 years during which time he continues to accrue seniority for purposes of a recall." (A-11). From this, the majority apparently suggests that TWA should do the same for the plaintiffs

(Footnote continued on following page)

It is also contrary to the ADEA's legislative history. The House of Representatives Report accompanying the 1978 amendments specifically says that the ADEA amendments do "not require employers to provide *special working conditions* for older workers to allow them to remain or become employed." H.R. Rep. No. 95-527, 95th Cong., 1st Sess. 12 (1977). The same report (p.12) also states that "[w]hile . . . *retraining and transfers* to less physically demanding jobs may be of great benefit to the older employees and the employer alike, these activities *are not required* by this legislation."

Indeed, as noted in *Williams v. General Motors Corp.*, 656 F.2d 120, 129 n.13 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982), the principle of neutrality "flows . . . directly from the ADEA's legislative history and avowed purpose." Based on its review of the legislative history, the court concluded in *Williams* that the ADEA "does not place an affirmative duty upon an employer to accord special treatment to members of the protected age group." Instead, a person's age "is accorded neutral status under the ADEA, neither facilitating nor hindering his employment, his chances for advancement, or his exposure to demotion or discharge." (656 F.2d at 129).

That was also the standard set by the Second Circuit in *Parcinski v. Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S. Ct. 725 (1983). In a decision by Judge Van Graafeiland, the dissenter here, the court held that the "ADEA does not require an employer to accord special treatment to employees over forty years of age. . . . It requires, instead, that an employee's age be treated in a neutral

here. Of course, TWA *already* does the same for these plaintiffs because they would also have been placed on furlough if they lacked sufficient seniority to remain on the job "due to a reduction in force" (Sec. 20(A)(1); J.A. 861). However, that does not mean they become eligible for a new accommodation based on age. As the dissent notes, "a 60 year old pilot should not be entitled to take a ten year furlough from a job he is forbidden by law to perform, accruing seniority status in the process. I don't believe Congress intended that such a pilot should be permitted to take a nine-year vacation and return to work at the age of 69 . . ." (A-36).

fashion, neither facilitating nor hindering advancement, demotion, or discharge."²⁰

By having Captains bid for Flight Engineer openings in the same manner as flight deck positions are normally filled under the collective bargaining agreement, TWA treated everyone in just such a neutral fashion. Under TWA's policy, 83% of those Captains seeking to serve beyond age 60 have succeeded in that regard pursuant to the terms of a neutral bona fide seniority system, *infra*, p. 21.²¹ Yet that is not good enough for the plaintiffs and the majority below. What plaintiffs have been

20 Accord, e.g., *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958, 960 (8th Cir. 1978); *Pirone v. Home Ins. Co.*, 559 F. Supp. 306, 311 (S.D.N.Y. 1983); *Reilly v. Friedman's Express, Inc.*, 556 F. Supp. 618, 621 (M.D. Pa. 1983).

21 When the plaintiffs were unable or unwilling to change their Captain status in accordance with the normal bidding procedures of the neutral seniority system, they were mandatorily retired at age 60 because they were in a position admittedly subject to the BFOQ provision in the ADEA (A-7 to A-8). That is consistent with this Court's recent statement in *EEOC v. Wyoming*, ___ U.S. ___, 103 S. Ct. 1054, 1058 (1983), that the ADEA contemplates employers being "permitted to use *neutral criteria* not directly dependent on age, and . . . that even criteria that are based on age are occasionally justified . . ." It is also consistent with the ADEA's legislative history. Senator Javits, one of the floor managers of the 1978 amendments, stated that "an employer may justify a lower age for mandatory retirement for some reason other than age—for example, for airline pilots, if age is shown to be a bona fide occupational qualification." 123 Cong. Rec. 34,318 (1977). He concluded that if "an agency with regulatory authority finds that . . . a person is unable to perform his duties as an airline pilot, the law permits that retirement." (*Id.*)

The importance of such Congressionally contemplated mandatory retirement under the ADEA was recently recognized and approved in *Johnson v. Mayor of Baltimore*, ___ F.2d ___, 34 FEP Cases 854, 857 (4th Cir. 1984) ("Where Congress itself has deemed age to be a *bona fide* occupational qualification for federal firefighters," mandatory retirement at age 55 for municipal firefighters was permitted under the ADEA). The same is equally applicable here for pilots. In fact, Senator Yarborough, the floor manager of the original Act in 1967, specifically used as an example of a BFOQ under the ADEA "a jet pilot who flies a plane at many hundreds of miles an hour." 113 Cong. Rec. 31,253 (1967). *Cf. also Vance v. Bradley*, 440 U.S. 93 (1979), where this Court upheld the legality of Congressionally established mandatory retirement for Foreign Service officers at age 60.

given by the majority is a virtual *guarantee* of a new position based on age simply because, in different and limited circumstances, similar positions were provided to a few for reasons unrelated to age. Indeed, the EEOC openly states that its plaintiffs are entitled to “affirmative action programs” whereby they are “automatically placed in a Flight Engineer position” (J.A. 841-42, No. 10).²²

Nowhere in the ADEA’s legislative history has there been suggested such an extreme standard of liability. Moreover, such a standard is contrary to what this Court has held is necessary in the related context of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (“Title VII”).²³ In *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577-78 (1978), this Court specifically said that the law “does not impose a duty” upon an employer “to adopt a . . . procedure that maximizes” the employment opportunities of a protected class.

At the time of the ADEA amendments in 1978, TWA was faced with the difficult task of satisfying the provisions of a new law and accommodating a 3,000 pilot work force whose movements were dictated by a pre-existing Working Agreement. That is something which this Court has recognized is a valid concern when it said that “[i]n many cases, . . . disruption of the existing seniority system [would] violate a collective-bargaining agreement, with all that such a violation entails for the employer’s labor relations.” *Ford Motor Co. v. EEOC*, 458 U.S. 219, 229 (1982).

22 See also the discussion by Judge Edwards in his arbitration decision recognizing that what plaintiffs are seeking are “automatic” rights to the Flight Engineer position, *supra*, p. 17 n.19. It is particularly ironic that the EEOC would take such a position when its very own ADEA regulations for employers prohibit “giving preference because of age” (29 C.F.R. § 1625.2(a)).

23 As this Court has said in comparing the ADEA with Title VII, “[t]here are important similarities between the two statutes . . . both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII.” *Lorillard v. Pons*, 434 U.S. 575, 584 (1978).

In the face of plaintiffs’ claims that everyone should be allowed to serve as Flight Engineers past 60 and ALPA’s claims that no one should serve past 60, TWA met both the obligations of the new law and the legitimate considerations of the Working Agreement.²⁴ The following chart shows that of those Captains seeking to serve beyond age 60 from the time of the ADEA amendments in April 1978 through the end of 1981, 83% have served or are now serving as Flight Engineers:

Year	No. of Captains Seeking to Serve as F/E Beyond Age 60	No. of Captains Awarded F/E Bids Who Have Served or Are Serving Beyond Age 60	Percent
1978	9	2	22.2%
1979	22	21	95.5
1980	12	10	83.3
1981	27	25	92.6
Total	70	58	82.9% ²⁵

24 In that regard, courts are “generally less competent than employers to restructure business practices,” *Furnco, supra*, 438 U.S. at 578. Despite this admonition, the majority’s opinion ignores the need for TWA to comply with *both* the ADEA and the RLA. For TWA to have gone as far as suggested by the majority to comply with the ADEA, it faced the risk of being charged with violating Section 6 of the RLA. That section prohibits a unilateral “change in . . . rates of pay, rules, or working conditions” (45 U.S.C. § 156).

In view of ALPA’s suit alleging just such a violation of the RLA (J.A. 108-15), TWA’s concern was very real, and this Court has often recognized the need to accommodate conflicting federal statutes. See, e.g., *Brotherhood of R.R. Trainmen v. Chicago R. & I. R.R.*, 353 U.S. 30, 40 (1957) (“There must be an accommodation of [the Norris-LaGuardia Act] and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved”); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 172 (1962) (“The policies of the Interstate Commerce Act and the [National Labor Relations Act] necessarily must be accommodated, one to the other”). TWA’s policy represents just such an accommodation.

25 Source: J.A. 189-90, ¶¶ 19-20; 891-93B. This data is “unrebutted” (A-61 n.8), and the success rate is even higher (92%) if the transitional year of 1978 is excluded.

Accordingly, the fairness of TWA's policy is borne out by its actual results. This 83% success rate is convincing evidence that plaintiffs cannot prove "the ultimate question of discrimination *vel non*." *United States Postal Service Board of Governors v. Aikens*, ___ U.S. ___, 103 S. Ct. 1478, 1481 (1983).

B. Applying the General Standard of Liability in Employment Discrimination Cases, TWA Has Complied With the ADEA

The same nondiscriminatory conclusion is compelled by an analysis under the disparate treatment standard articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), and reaffirmed in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).²⁶ There, this Court summarized "the basic allocation of burdens and order of presentation of proof in a . . . case alleging discriminatory treatment." (450 U.S. at 252). In the first instance, "the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination." (*Id.* at 252-53). If the plaintiff succeeds in that respect, then "the burden shifts to the defendant 'to articulate some legitimate,

²⁶ While *McDonnell Douglas* and *Burdine* were disparate treatment cases arising under Title VII, their standard for imposing liability has been utilized in many ADEA cases. See, e.g., *Garner v. Boorstin*, 690 F.2d 1034, 1036-37 (D.C. Cir. 1982); *Massarsky v. General Motors Corp.*, 706 F.2d 111, 117-19 (3d Cir.), *cert. denied*, ___ U.S. ___, 104 S. Ct. 348 (1983); *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1100 n.7 (8th Cir. 1982); *EEOC v. Frontier Airlines, Inc.*, 673 F.2d 1155, 1158-59 (10th Cir. 1982); *Krieg v. Paul Revere Life Ins. Co.*, 718 F.2d 998, 999 (11th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S. Ct. 1712 (1984).

In a disparate treatment case, "[p]roof of discriminatory motive" by the employer "is critical" to establishing liability. *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). It is to be distinguished from claims of "disparate impact" which "involve employment practices that are facially neutral . . . but . . . fall more harshly on one group than another and cannot be justified by business necessity." (*Id.* at 336 n.15). The "disparate treatment" test is the predominant standard in ADEA cases, and it has been argued "that only disparate treatment claims should be available in age discrimination cases." Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837, 838 (1982).

nondiscriminatory reason for the employee's rejection.' " (*Id.* at 253). Finally, "should the defendant carry this burden, the plaintiff must then have an opportunity to prove . . . that the legitimate reasons . . . were a pretext for discrimination." (*Id.*)

While this test "was never intended to be rigid, mechanized or ritualistic," it can represent a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco, supra*, 438 U.S. at 577. Its application here convincingly shows that TWA's actions were nondiscriminatory.

1. The Plaintiffs Cannot Establish a Prima Facie Case

As the majority below noted, a "prima facie case of discriminatory treatment under the ADEA (as under Title VII) may ordinarily be made out by meeting the four requirements set forth in" *McDonnell Douglas* (A-23).²⁷ Applying the facts of this case to the general criteria in *McDonnell Douglas*, the district court properly said that in order to establish a prima facie case, a plaintiff must show:

- "1. he was a member of the protected age group;
2. he was terminated;
3. there was a vacancy in the position sought at the time he applied;
4. he was qualified for the position sought." (A-55).

²⁷ The four *McDonnell Douglas* requirements for establishing a prima facie case include (in a Title VII context) the following:

- "(i) that he belongs to a racial minority;
- (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
- (iii) that, despite his qualifications, he was rejected; and
- (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." (411 U.S. at 802).

These standards, with modifications to meet particular situations, have often been applied in ADEA cases. See, for example, the discussion in *Williams v. General Motors Corp.*, *supra*, 656 F.2d at 127-28, and cases cited at *supra*, p. 22, n.26.

As the district court recognized, "prongs one, two and four of the *McDonnell* test were facially satisfied" by the plaintiffs (A-56). All were "members of the protected age group, *i.e.*, between the age of forty and seventy; 29 U.S.C. § 631(a); each of them was terminated as pilots and forced to retire; most of them were 'qualified for the position sought,' *i.e.*, they were qualified to bid for and receive the position of Flight Engineer." (A-56). However, with respect to the question of an available vacancy, even the Second Circuit said "it is clear, as the district court held, that [plaintiffs] could not establish that there were flight engineer vacancies at the time they applied to transfer." (A-23).²⁸

Despite this admission, the majority held that a "plaintiff is not barred by the *McDonnell Douglas* method from making out a *prima facie* case of age discrimination by alternative means, such as *direct* proof that an employer discriminates on the basis of age." (A-24) (emphasis in original). The majority's "evidence" in this regard was that "TWA grants the downgrading requests of all pilots with sufficient seniority except those of captains and first officers who reach age 60. This direct evidence of a differentiation based solely on age is sufficient to give rise to an inference of discriminatory motive, . . . and establishes, therefore, a *prima facie* case of discriminatory treatment." (A-24).²⁹

28 See also the discussion by the district court at A-56 to A-57. The importance of the need for a vacancy to show a *prima facie* case was fully recognized by this Court when it said that "the *McDonnell Douglas* formula . . . does demand that the alleged discriminatee demonstrate at least that his rejection did not result from . . . the absence of a vacancy in the job sought." *Teamsters v. United States*, *supra*, 431 U.S. at 358 n.44.

This language from *Teamsters* was recently cited with approval in another ADEA case, *EEOC v. TWA*, 544 F. Supp. 1187, 1218 n.323 (S.D.N.Y. 1982). See also, *e.g.*, *Brody v. President of Harvard College*, 27 FEP Cases 496, 499 (D. Mass. 1980), *aff'd*, 664 F.2d 10 (1st Cir. 1981), *cert. denied*, 455 U.S. 1027 (1982) (requirement of vacancy under the ADEA in order to establish *prima facie* case).

29 This is in contrast to what the Second Circuit had said in *Cates v. TWA*, 561 F.2d 1064, 1074 (2d Cir. 1977), when it observed in a Title VII case that TWA's pilot seniority system "admittedly was *not* instituted for discriminatory reasons and has not been applied in other than a neutral manner . . ." See discussion, *infra*, p. 27.

The basis for the majority's conclusion, however, is simply wrong and reflects a misunderstanding as to how a seniority system operates. As this court said in *TWA v. Hardison*, 432 U.S. 63, 79, 81 (1977), seniority in the collective bargaining context "lies at the core of our national labor policy" and "seniority systems are afforded special treatment" under the law. This is because of their "overriding importance" in collective bargaining since they "determine who gets or who keeps an available job." *Humphrey v. Moore*, 375 U.S. 335, 346-47 (1964).³⁰ Implicit in that statement is this Court's recognition that in any seniority system, not everyone gets what he or she wants. TWA's pilot seniority system is no exception (J.A. 186, ¶ 8). This was recognized by the district court when it said that "in any bidding situation for a vacancy, the bidders frequently outnumber the vacancies and not all bids can be accommodated." (A-48).

As a result, the district court properly held that the plaintiffs "cannot establish a *prima facie* case of discrimination solely because no job vacancy existed at the time they applied and were eligible for the job. TWA was legally obligated to remove these pilots at age sixty under the FAA regulations. TWA was not obligated, however, to offer these ex-pilots jobs which did not exist. To the extent jobs existed, TWA was justified in relying upon a seniority bidding system." (A-57).³¹

30 These principles were reaffirmed in *American Tobacco Co. v. Patterson*, 456 U.S. 63, 76-77 (1982). They are also consistent with this Court's holding in *California Brewers Ass'n v. Bryant*, 444 U.S. 598, 608 (1980), that courts should not "second guess" such seniority systems, "reflecting as they do . . . the specific characteristics of a particular business or industry . . ." Such comments are particularly appropriate to seniority systems of commercial airlines which are all subject to the unique requirements of FAA safety regulations.

31 A recent district court decision has also viewed the lack of a vacancy as a possible determinative factor in rejecting a plaintiff's claims of age discrimination. In *Reilly v. Friedman's Express, Inc.*, *supra*, 556 F. Supp. 618, the plaintiffs alleged that they had applied for the disputed positions. In considering this question, the court noted that "[a] concomitant requirement with the need for the plaintiff to apply for that job is that a job actually exists. . . . For if no job exists, it would be impossible for a plaintiff to prove he was not hired because of his age." (*Id.* at 623).

(Footnote continued on following page)

2. *Even If Plaintiffs Have Established a Prima Facie Case, TWA Has Provided a Legitimate, Nondiscriminatory Reason for Its Actions*

Even if, as the majority holds (A-24), plaintiffs have established a prima facie case, the neutral bidding procedure of the Working Agreement is a "legitimate, nondiscriminatory" reason for TWA's actions.³²

In rejecting such a reason (A-25 to A-26), the majority ignored this Court's ruling in *Burdine* that the threshold necessary for an employer to show a "legitimate, nondiscriminatory" reason is not onerous. "The defendant need not persuade the court that it was actually motivated by the proffered reasons . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." (450 U.S. at 254-55).

This low threshold has been held to apply equally in ADEA cases. The Second Circuit has itself said that "the law does not require, in the first instance, that employment be rational, wise or well-considered—only that it be nondiscriminatory." *Powell v. Syracuse University*, 580 F.2d 1150, 1156-57 (2d Cir.), cert.

As its basis for this statement, the court relied on this Court's language in *Teamsters* on the need for a "vacancy," *supra*, p. 24, n.28, and also on *Smith v. World Book-Childcraft International, Inc.*, 502 F. Supp. 96 (N.D. Ill. 1980). There, the plaintiff was a branch manager in Illinois who had been terminated by the employer. As part of his ADEA complaint, he "allege[d] that he applied and was qualified for an available branch manager's position" in Knoxville, Tennessee (*id.* at 99). In rejecting his claims, the court ruled "that the position to which [plaintiff] requested transferral was unavailable at the time of his request. Consequently, it would be impossible for [plaintiff] to prove that World Book's failure to transfer him to Knoxville was predicated upon impermissible factors such as age." (*Id.*)

32 The legitimacy of this reason stems from the ADEA's protection in Section 4(f) (2), 29 U.S.C. § 623(f) (2), for "observ[ing] the terms of a bona fide seniority system." TWA's policy can also be viewed as "based on reasonable factors other than age" under Section 4(f) (1) of the ADEA, 29 U.S.C. § 623(f) (1). *Cf.*, e.g., *EEOC v. Wyoming*, *supra*, 103 S. Ct. at 1058; *Aldendifer v. Continental Airlines*, 19 FEP Cases 1090, 1096 (C.D. Cal. 1978), *aff'd on other grounds*, 650 F.2d 171 (9th Cir. 1981).

denied, 439 U.S. 984 (1978). Accord, e.g., *Smith v. University of North Carolina*, 632 F.2d 316, 346 (4th Cir. 1980); see also, *Lieberman v. Gant*, 630 F.2d 60, 65 (2d Cir. 1980) (Title VII) ("It is enough for the defendants . . . to bring forth evidence that they acted on a neutral basis").

Clearly, TWA's "proffered" reason more than satisfies the necessary threshold. Not only did the district court recognize that TWA's seniority system "was instituted for nondiscriminatory reasons and . . . applied in a neutral manner" (A-60), but so has the Second Circuit itself in *Cates v. TWA*, *supra*, 561 F.2d at 1074. The court there stated that "the operation of the seniority system" in the TWA pilot Working Agreement "admittedly was not instituted for discriminatory reasons and has not been applied in other than a neutral manner . . ." "[I]ncorporated" in the Working Agreement, the seniority system "governs each pilot's job assignments . . . [and] eligibility for transfer," *Cates*, *supra*, at 1065. It "was instituted well before the effective date of the ADEA amendments and is not in any way predicated upon age; rather, it depends solely on length of service with the company." (A-60) (see also *Cates*, *supra*, 561 F.2d at 1066; Sec. 17(A)(1); J.A. 294).³³

33 A bona fide seniority system requires that it be "applied fairly and impartially to all employees, that it not have its 'genesis in [unlawful] discrimination,' and that it be maintained free from illegal purposes." *Acha v. Beame*, 570 F.2d 57, 64 (2d Cir. 1978) (brackets in original). See also, e.g., *Morelock v. NCR Corp.*, 586 F.2d 1096, 1105-06 (6th Cir. 1978), cert. denied, 441 U.S. 906 (1979).

The seniority system of the TWA Working Agreement clearly meets all of these criteria. The system is neutral on its face and in its application, *Cates v. TWA*, *supra*, 561 F.2d at 1074, and it was designed at a time when the ADEA was not even enacted (A-48; J.A. 186, ¶ 9). The Working Agreement has adhered ever since to the same basic seniority system, which has been negotiated and maintained free from consideration of age (J.A. 186, ¶ 8).

The Working Agreement is also not a "subterfuge to evade the purposes" of the ADEA since, as noted above, it "was effectuated far in advance of the enactment of the law, eliminating any notion that it was adopted as a subterfuge for evasion." *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 215 (5th Cir. 1974). Accord, e.g., *United Air Lines, Inc. v. McMann*, *supra*, 434 U.S. at 203; *Jensen v. Gulf Oil Refining & Marketing Co.*, 623 F.2d 406, 413 (5th Cir. 1980).

The plaintiffs, unable or unwilling to obtain a Flight Engineer vacancy prior to age 60 pursuant to the neutral provisions of the TWA pilot seniority system (A-23), were mandatorily retired as Captains because they were no longer qualified to perform that particular job. The FAA "age 60" rule prohibits the employment of anyone as a Captain beyond that age, and all the parties agree this rule is subject to the "BFOQ" provision in the ADEA (A-7 to A-8).³⁴ That was found by the district court to comply with the ADEA because "any denial of Flight Engineer status to pilots resulted from the neutral application of this bona fide seniority system and not by discriminatory treatment on the basis of age. Their forced retirement at age sixty was due solely to their reaching that age while in the pilot status." (A-60).³⁵

Around sixty former TWA Captains are now serving or have served as Flight Engineers beyond age 60 (J.A. 189, ¶ 18). In each case, it is undisputed they have been filling Flight Engi-

34 Section 4(f)(1) permits retirement prior to age 70 "where age is a bona fide occupational qualification ['BFOQ'] reasonably necessary to the normal operation of the particular business" (29 U.S.C. § 623(f)(1)).

The House Report accompanying the 1978 amendments recognizes that employers have a right to have mandatory retirement at an age that is a BFOQ. The Report states "it is not intended that the [amendments] prohibit mandatory retirement or other employment practices where age is a bona fide occupational qualification . . . [under Section] 4(f)(1)." H.R. Rep. No. 95-527, 95th Cong., 1st Sess. 12 (1977). See also comments by Senator Javits, *supra*, p. 19, n.21, and his comments at 123 Cong. Rec. 34,297 (1977) ("At the administration's request, clarifying language was approved which permits the establishment of a designated retirement age less than age 70 where the employer can show that age is a bona fide indicator of job performance"). Cf. *Johnson v. Mayor of Baltimore*, *supra*, 34 FEP Cases at 857, where the Fourth Circuit recently upheld under the ADEA the mandatory retirement of municipal firefighters at age 55 because "Congress has deemed age to be a bona fide occupational qualification for federal firefighters . . ."

35 Of course, under Section 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), the seniority system cannot "require or permit" involuntary retirement because of age. However, as the district court noted above, it is not the seniority system which results in a pilot retiring at age 60 but the FAA "age 60" rule which is subject to the ADEA's "BFOQ" exception.

neer vacancies to which they were entitled by virtue of their positions on the pilot seniority list.³⁶

3. *The Plaintiffs Cannot Show That TWA's Policy Was a Pretext*

Clearly, TWA has "articulate[d] some legitimate, nondiscriminatory reason for the employee's rejection." *Burdine*, *supra*, 450 U.S. at 253. The majority below therefore erred when it failed to take the third step in the *Burdine* standard and examine whether TWA's actions were "pretextual." (A-31 n.18).

Had the majority taken that third step, it would have found there was no such pretext. Since TWA has around sixty former Captains who have served or are now serving beyond age 60 as Flight Engineers and another ninety "career" Flight Engineers similarly situated (J.A. 189, ¶ 18), it is simply impossible to show that TWA's policy is "a pretext" for age discrimination. TWA is the only trunk airline which has voluntarily permitted former Captains to downbid to Flight Engineer and serve in that capacity beyond age 60.³⁷ This has been done in accord-

36 The majority's decision below criticizes not only TWA's basic "age 60" policy (A-9 to A-10), but it criticizes (A-11 to A-12) certain refinements made by TWA to treat everyone equally, *supra*, pp. 10-11. However, this Court has recognized in *California Brewers Ass'n v. Bryant*, *supra*, 444 U.S. at 607, that "[i]n order for any seniority system to operate at all, it has to contain ancillary rules that accomplish certain necessary functions, but which may not themselves be directly related to length of employment."

Moreover, it is obviously "legitimate" and "nondiscriminatory," *Burdine*, *supra*, 450 U.S. at 254, for TWA to require a threshold level of competence as a Flight Engineer by having written proof of successful completion of the FAA written exam at the time of training. See also *EEOC v. Frontier Airlines, Inc.*, *supra*, 673 F.2d at 1159, where, under the ADEA, a person's failure to meet pilot medical requirements at the time of training "presented sufficient evidence of nondiscriminatory reasons for preventing [him] from starting the [training] class." Of course, under Section 601(b) of the Federal Aviation Act, 49 U.S.C. § 1421 (b), TWA has the statutory duty "to perform [its] services with the highest possible degree of safety . . ."

37 See J.A. 487-88; 492, No. 12; see also J.A. 561, 562. Those carriers which have subsequently permitted former Captains to serve as Flight Engineers beyond 60 reacted only after lawsuits were brought to compel them to adopt such a policy.

ance with the neutral provisions of the Working Agreement, and it required no change in the language of the Working Agreement.

83% of those Captains who wanted to serve as Flight Engineers have done so, *supra*, p. 21. By any statistical criteria, this is compelling evidence of the fairness of TWA's "age 60" policy. Indeed, it strains credulity for anyone to claim there was intentional discrimination here when there has been an 83% success rate for Captains and a 100% success rate for "career" Flight Engineers. This record is unequalled amongst the trunk airlines, and it was accomplished despite ALPA's law suit against TWA for having adopted such a policy. As the dissent noted, TWA is really worthy "of receiving commendation for what it has done" (A-36).

The plaintiffs have therefore failed on every count to satisfy *McDonnell Douglas* and *Burdine*. They could not establish a prima facie case, and even if they could, TWA has offered a "legitimate, nondiscriminatory" reason which plaintiffs are unable to show was pretextual. Accordingly, this Court should remand to the lower court with instructions to dismiss the complaint.

II. THE TEST FOR "WILLFULNESS" UNDER THE ADEA SHOULD REQUIRE PROOF OF SPECIFIC INTENT TO DISCRIMINATE

A. The Decision Below

The majority below not only erred in finding TWA liable under the ADEA, but it also erred in its rulings on damages even assuming such liability. Without benefit of trial and on the basis of nothing more than "an inference of discriminatory motive" (A-24), the majority held that TWA was guilty of a "willful" violation of the ADEA entitling plaintiffs to liquidated damages.

Under the ADEA, liquidated damages are "double damages . . . equal to the pecuniary losses sustained by way of lost wages" (A-33). The majority stated that in order to recover

such damages "in a case based on discriminatory treatment," "plaintiffs need not prove a specific intent to violate the ADEA; it is sufficient to establish that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." (A-33).

Under the majority's view, " '[i]n a discriminatory treatment case . . . an employer's action, if taken *because of* an impermissible factor such as age, cannot be the result of negligence, mistake, or other innocent reason.' " (A-33 to A-34) (emphasis in original). It follows from this statement that any time there is a finding of disparate treatment (even when it is admittedly inferred) (A-24), liquidated damages *automatically* result.³⁸ That is inconsistent with the language of the ADEA, its legislative history, other statutes and basic principles of tort and general damages.

B. Liquidated Damages and the Two-Tiered Level of Liability

In Section 7(b) of the ADEA, Congress mandated "[t]hat liquidated damages shall be payable *only* in cases of *willful* violations of *this Act*." (29 U.S.C. § 626(b)). Congress has thereby clearly established a two-tiered level of liability under the ADEA, one non-willful and one willful.³⁹ The courts which

³⁸ After quoting the test cited above, the majority's decision simply states: "Applying these principles, TWA was *clearly aware* of the 1978 ADEA amendments; indeed, it was required to post them, 29 U.S.C. § 627." (A-34). No finding was made that TWA knowingly acted with specific intent to discriminate, and indeed, it is "unrebutted" that 83% of those Captains seeking to serve as Flight Engineers beyond age 60 have succeeded in that regard (A-61 n.8).

³⁹ See also *Lorillard v. Pons*, *supra*, 434 U.S. at 581, where the Court stated that "Congress altered the circumstances under which such awards [for liquidated damages] would be available in ADEA actions by mandating that such damages be awarded *only where* the violation of the ADEA is willful." See also *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 155 (7th Cir. 1981) ("[T]he legislative history of the ADEA suggests that the Congressional framers thought that non-willful discrimination directed towards an individual was quite possible").

have best recognized the distinction between these two tiers are those which have required proof of specific intent to do an act forbidden by the ADEA. That is the test presently followed by the First and Seventh Circuits.

In the First Circuit, an "act is done 'willfully' if done voluntarily and intentionally, *and with the specific intent to do something the law forbids*; that is to say, with bad purpose either to disobey or disregard the law." *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020 n.27 (1st Cir. 1979). Similarly, in the Seventh Circuit, "a finding of willfulness should lie *only if* there is some showing as to the defendant's *knowledge of the illegality* of his actions." *Syvock v. Milwaukee Boiler Mfg. Co.*, *supra*, 665 F.2d at 155.⁴⁰ Accord, *e.g.*, *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1165 (S.D.N.Y. 1983) (Weinfeld, J.) ("subscrib[ing] to the view that to entitle plaintiff to receive liquidated damages he must establish that the defendant acted with *knowledge of the illegality* of his action"); *Whittlesey v. Union Carbide Corp.*, 567 F. Supp. 1320, 1330 (S.D.N.Y. 1983) (following *Koyen*).

C. The Plain Language of the ADEA Supports Such a Test

As this Court has recognized, "willful . . . is a word of many meanings, its construction often being influenced by its context." *Spies v. United States*, 317 U.S. 492, 497 (1943). In this ADEA context, "Congress exhibited both a detailed knowledge of the FLSA^[41] provisions and their judicial interpretation *and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation.*" *Lorillard v. Pons*, *supra*, 434 U.S. at 581.

⁴⁰ The *Syvock* court reasoned that to allow liquidated damages for "willful" violations "without any showing as to the defendant's state of mind" would lead to automatic doubling in all disparate treatment cases. This result, the court continued, was without support in the ADEA's language or legislative history (*id.* at 154-55).

The *Syvock* language was most recently cited with approval by the Seventh Circuit in *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743, 757-58 (7th Cir.), *cert. denied*, ___ U.S. ___, 104 S. Ct. 484 (1983).

⁴¹ The Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*

The liquidated damages provision for "willfulness" presents precisely one such point of departure. The remedial provision of the FLSA incorporated into the ADEA is 29 U.S.C. § 216(b). That FLSA provision "[b]y its terms . . . requires that liquidated damages be awarded *as a matter of right* for violations of the FLSA." *Lorillard, supra*, 434 U.S. at 581 n.8. To avoid such automatic doubling for an ADEA violation, Congress expressly chose language in Section 7(b) indicating that liquidated damages were to be the exception and not the rule: "*Provided*, that liquidated damages shall be payable *only* in cases of *willful* violations of this Act." (29 U.S.C. § 626(b)).

Had Congress intended to be so generous in permitting double damages, it could have easily done so. Its proviso, however, is a clear indicator that it regarded the FLSA's automatic doubling as "undesirable or inappropriate for incorporation." *Lorillard, supra*, 434 U.S. at 581.⁴²

D. The Legislative History Supports Requiring Specific Intent to Discriminate

While some courts are of the mistaken view that there is no legislative history defining "willful" under the ADEA,⁴³ there

⁴² An example of how far the lower courts have strayed from the intent of Congress to have a two-tiered level of liability under the ADEA is evident from *Crosland v. Charlotte Eye, Ear and Throat Hosp.*, 686 F.2d 208, 217 (4th Cir. 1982), which holds that "'an employer acts willfully . . . if he knows or has reason to know, that his conduct is *governed by* [the ADEA].'"

Given the prominence of the ADEA, such a test would read the statutory language "*only in cases of willful violations*" out of the ADEA. That would be contrary to the cardinal principle that a statute "'ought . . . to be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant.'" *United States v. Campos-Serrano*, 404 U.S. 293, 301 n.14 (1971). See also, *e.g.*, *Aero Mayflower Transit Co. v. ICC*, 535 F.2d 997, 1001 (7th Cir. 1976) ("If Congress intended that every civil violation . . . would activate Commission powers of revocation and suspension, regardless of fault, it would not have drafted 'willful' into" Section 212(a) of the Interstate Commerce Act, 49 U.S.C. § 312(a)).

⁴³ See, *e.g.*, *Kelly v. American Standard, Inc.*, 640 F.2d 974, 979 (9th Cir. 1981); *Wehr v. Burroughs Corp.*, 619 F.2d 276, 282 (3d Cir. 1980). In this regard, the brief *amicus curiae* of United Air Lines, Inc. is equally wrong (p. 5).

actually are strong indications in the legislative history that Congress intended the liquidated damages provision to serve as a substitute for punitive damages. The standard TWA proposes, specific intent to discriminate, is entirely consistent with and best effectuates this legislative intent.

The original bill proposed by the Administration made it a crime to willfully commit any practice made unlawful by the bill. S. 830, H.R. 3651, 90th Cong. 1st Sess., 113 Cong. Rec. 2199 (1967) (remarks of Senator Javits). However, Senator Javits found "certain serious defects" in the Administration bill (*id.*) and introduced an alternative bill, S. 788, 90th Cong., 1st Sess. (1967). In place of the criminal provision, Senator Javits proposed language that formed the genesis of Section 7(b) of the ADEA. His proposed Amendment No. 125 provided that "[a]ny person who violates" the statute shall be liable for unpaid compensation, "and in the case of willful violation of this Act, in an additional equal amount as liquidated damages." 113 Cong. Rec. 7077 (1967). This language, with only minor modification, was enacted into the ADEA. In explaining his proposal, Senator Javits made it clear that liquidated damages were incorporated to deter and punish violators:

"[T]he criminal penalty in cases of willful violation has been eliminated and a double damage liability substituted. *This will furnish an effective deterrent to willful violations* and at the same time avoid the difficult problems of proof which would arise under a criminal provision." (*Id.* at 7076).

From this, "[i]t is quite apparent that Senator Javits . . . held the view that liquidated damages could effectively supply the deterrent and punitive damages which both criminal penalties and punitive damages normally serve." *Dean v. American Security Insurance Co.*, 559 F.2d 1036, 1040 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978). See also *Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834, 840 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978) ("If the employer's conduct

has been such as to merit punitive treatment, then he is to be penalized by doubling the award").⁴⁴

Given the Congressional interest in using the civil remedy of liquidated damages to deter and punish violations, guidance on the meaning of "willful" can properly be drawn from general tort standards for punitive damages.⁴⁵ Such an analysis supports the conclusion that specific intent to violate the ADEA should be the necessary test.⁴⁶

44 See also, *e.g.*, *Balmer v. Community House Ass'n*, 572 F. Supp. 1048, 1049 (E.D. Mich. 1983) (ADEA liquidated damages "overlap" with exemplary or punitive damages recoverable under state law); *Gifford v. B.D. Diagnostics*, 458 F. Supp. 462, 464 (N.D. Ohio 1978) ("liquidated damages are to take the place of punitive damages under the ADEA"); Smith & Leggette, *Recent Issues in Litigation Under the Age Discrimination in Employment Act*, 41 Ohio St. L. J. 349, 369 (1980) ("Congress apparently meant the liquidated damages provision to serve as a substitute for punitive damages").

45 Generally, to recover punitive or exemplary damages in tort, there must be "certain aggravating circumstances, such as malice, wantonness, willfulness, oppression, gross negligence, or fraud . . ." 25 C.J.S. *Damages* § 123(1) (1966), at p. 1133. Such damages are given "as an enhancement of compensatory damages because of the . . . character of the acts complained of." 22 Am. Jur. 2d *Damages* § 236 (1965), at p. 322. See, *e.g.*, *Lake Shore & Mich. S. Ry. v. Prentice*, 147 U.S. 101, 107 (1893) ("guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages"); *Lee v. Southern Home Sites Corp.*, 429 F.2d 290, 294 (5th Cir. 1970) ("punitive damages . . . may be imposed if a defendant has acted wilfully [sic] and in gross disregard for the rights of the complaining party").

46 In presenting the ADEA, Senator Javits also stated:

"We now have the enforcement plan which I think is best adapted to carry out this age-discrimination-in-employment ban with the least overanxiety or difficulty on the part of American business . . ." 113 Cong. Rec. 31,254 (1967).

His reference to "least overanxiety or difficulty" is a further indication that Congress did not contemplate automatic double damages or anything approaching such an easy standard of liability. See also, *e.g.*, *Hays v. Republic Steel Corp.*, 531 F.2d 1307, 1311 (5th Cir. 1976) ("The Senator's reference . . . could hardly have been made if there were an absolute imposition of liquidated damages").

A specific intent test also harmonizes with this Court's requirement that discriminatory purpose "implies more than intent as volition or intent as awareness of consequences." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979). Instead, it "implies that the decisionmaker," e.g., an employer, "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." (*Id.*) See also, e.g., *Guardians Association v. Civil Service Commission*, ___ U.S. ___, 103 S. Ct. 3221, 3230 n.20 (1983) (White, J.) ("It is not uncommon in the law for the extent of a defendant's liability to turn on the extent of his knowledge or culpability").

The current confusion among the Circuits, and the resulting permissive standards in some for double damages, results from a wooden adherence to the traditional definition of "willful" in the civil context. There, it "often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental," *United States v. Murdock*, 290 U.S. 389, 394 (1933). Some Circuits—such as the Third, Sixth and Ninth—have applied this definition literally to the ADEA context, resulting in standards similar to those followed by the court below.⁴⁷

Adherence to an "intentional, knowing or voluntary" definition therefore results in equating a finding of disparate

47 See, e.g., *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1184 (6th Cir. 1983) (to show willfulness, an ADEA plaintiff must simply "show that the employer's actions were voluntary and intentional"); *Kelly v. American Standard, Inc.*, *supra*, 640 F.2d at 980 (a "knowing and voluntary violation" suffices for liquidated damages); *Wehr v. Burroughs Corp.*, *supra*, 619 F.2d at 283 (requiring only proof "that the company discharged the employee because of age and that the discharge was voluntary and not accidental, mistaken, or inadvertent").

In contrast, the *Syvock* court specifically noted how its "focus on the defendant's state of mind at the time the alleged discriminatory acts occurred" differed from the misnomered "deliberate, intentional, and knowing" test adopted by the Circuits above. See 665 F.2d at 155. As noted previously, the *Syvock* court adopted its standard after examining the "legislative history of the ADEA" and concluding "that the Congressional framers thought that non-willful discrimination directed towards an individual was quite possible." (*Id.*)

treatment with a finding of willfulness. Where a jury finds in a disparate treatment case that a decision was made because of age, it "necessarily conclude[s] that [the employer's] action was intentional." *Goodman v. Heublein, Inc.*, 645 F.2d 127, 131 n.6 (2d Cir. 1981).⁴⁸ However, in the search for willfulness, a finding of disparate treatment should only begin the inquiry. Requiring specific intent to do an act forbidden by the ADEA is more faithful to the statute's plain language, its legislative history and the better reasoned opinions below. It should be adopted here.⁴⁹

48 See also, e.g., *Duffy v. Wheeling Pittsburgh Steel Corp.*, 33 FEP Cases 730, 736 n.4 (E.D. Pa. 1983) ("a violation is willful in any discriminatory treatment case").

49 If the specific intent test is not adopted, this Court should consider adopting a "good faith" standard. This was originally applied to ADEA cases in *Hays v. Republic Steel Corp.*, *supra*, 531 F.2d at 1311, and it permits a trial court to deny liquidated damages, in whole or in part, upon a "finding that the employer acted in good faith and had reasonable grounds for believing that its actions were not violative of the ADEA." *Elliot v. Group Medical & Surgical Serv.*, 714 F.2d 556, 558 n.2 (5th Cir. 1983). See also, e.g., *Hedrick v. Hercules, Inc.*, 658 F.2d 1088, 1096 (5th Cir. 1981) (allowing "discretion to deny or reduce liquidated damages" upon a showing by the employer that it acted in a "good faith effort to comply with the ADEA through the establishment of guidelines" to be followed in implementing a reorganization plan).

In any event, it should be noted the Government is not entitled as a matter of law to recover liquidated damages here. As enacted in 1967, Section 7(b) of the ADEA specifically incorporated several FLSA sections, including the liquidated damages provision in 29 U.S.C. § 216(c). However, Section 7(b) made no provision for incorporating any future amendments to the FLSA, and the Government was not entitled to recover liquidated damages under the FLSA until an amendment in 1974. Pub. L. No. 93-259, § 26, 88 Stat. 73. It is a "well-settled canon" that where a statute like the ADEA "adopts the particular provisions of another [statute] by a specific and descriptive reference, . . . [s]uch adoption takes the [latter] statute as it exists at the time of adoption," *Hassett v. Welch*, 303 U.S. 303, 314 (1938). Therefore, the ADEA "does not include subsequent additions or modifications of the [FLSA] . . . unless it does so by express intent." (*Id.*)

When Congress amended the ADEA in 1978, it manifested no such "express intent" and could easily have done so. Accordingly, *Hassett* dictates that the powers granted to the Government in 1974 to recover liquidated damages under the FLSA were not incorporated in the ADEA.

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Nos. 83-997, 83-1325

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A.
PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION and AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL,
Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A.
PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION and TRANS WORLD AIRLINES, INC.,
Respondents.

On Writs of Certiorari to the United States
Court of Appeals for the Second Circuit

**MOTION TO SUBMIT BRIEF AS AMICUS CURIAE
AND BRIEF AMICUS CURIAE OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL
IN SUPPORT OF REVERSAL**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-997, 83-1325

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A.
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MOTION OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL
FOR LEAVE TO SUBMIT BRIEF AS AMICUS CURIAE

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42.3 of the Rules of this Court, the Equal Employment Advisory Council ("EEAC") moves this Court for leave to file the accompanying brief as Amicus Curiae supporting Trans World Airlines, Inc., the petitioner in No. 83-997 and the respondent in No. 83-1325. In support of this motion, EEAC shows as follows:

1. EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. The Council is governed by a board of directors which is composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. Substantially all of the Council's members, or their constituents, are subject to the provisions of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-634 (the "ADEA"). As such, they have a direct interest in the issues presented for the Court's determination in this case—i.e., whether the ADEA requires an employer to accommodate employees for an age-related reason

merely because it provides accommodation for non-age-related reasons; whether specific intent to discriminate is necessary to establish a "willful" violation of the ADEA; and whether a union found jointly with an employer to have violated the ADEA can be absolved from liability for monetary damages.

3. Because of its interest in issues arising under the ADEA, the Council has participated as amicus curiae in a number of cases in this Court involving the interpretation and enforcement of the Act. *See, e.g., Lorillard v. Pons*, 434 U.S. 573 (1978); *Shell Oil Co. v. Dartt*, 434 U.S. 99 (1977). In addition, EEAC has filed briefs as amicus curiae on numerous other occasions in this Court. *See, e.g., Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

4. In several cases, EEAC sought and was granted permission by this Court to file such briefs. *See, e.g., Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978); *Shell Oil Company v. Dartt*, 434 U.S. 99 (1977); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).

5. Trans World Airlines, the Air Line Pilots Association and the United States have consented to the filing of this brief. Their consents have been filed with the Clerk. Efforts to obtain the consent of the counsel for the respondents Harold H. Thurston, Christopher J. Clark, and C. A. Parkhill were unsuccessful, thus necessitating this motion.

WHEREFORE, it is respectfully moved that EEAC be granted leave to file the accompanying brief amicus curiae in this case.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council
("EEAC") respectfully submits this brief amicus

curiae in support of Trans World Airlines, Inc. ("TWA"), the petitioner in No. 83-997 and the respondent in No. 83-1325, contingent upon the Court's granting the accompanying motion.

INTEREST OF THE AMICUS CURIAE

The interest of the EEAC in this case is fully set forth in the accompanying motion.

STATEMENT OF THE CASE

In 1978, TWA decided to permit flight deck crew members in the status of "flight engineer"¹ to work until age seventy. Prior to this time, TWA's policy had been to require all flight crew members, including "captains" (pilots), "first officers" (co-pilots) and "flight engineers" to retire at age sixty. Federal Aviation Administration (FAA) regulations prohibit persons who have reached their sixtieth birthday from serving as pilots. 14 C.F.R. § 121.383(c). The parties do not dispute that an age below sixty is a bona fide occupational qualification ("BFOQ") under 29 U.S.C. § 623(f)(1)² with respect to pilots and co-pilots. No FAA regulation requires the retirement at age sixty of flight engineers.

Prior to 1978, the ADEA had been interpreted to permit the mandatory retirement of persons such as

¹ Flight engineers are present on most commercial flights and are responsible, among other things, for pre-flight inspection and in-flight monitoring of the aircraft.

² 29 U.S.C. § 623(f)(1) provides in relevant part as follows:

It shall not be unlawful for an employer . . . (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . .

TWA's flight engineers before age sixty-five if the retirement was pursuant to a bona fide employee benefit plan which was not being used to circumvent the policies underlying the ADEA. See *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977). In 1978, however, the ADEA was amended to prohibit involuntary retirement before age seventy pursuant to a bona fide employee benefit plan. As a result of the 1978 amendments to the ADEA, TWA changed its policy to prohibit the mandatory retirement of "any cockpit member who [was] in a Flight Engineer status at age 60." The result of this change in policy was to permit flight engineers reaching age sixty to continue in employment and to permit captains and first officers to downbid to the position of flight engineer and to remain in that position beyond age sixty. The downbidding of captains and first officers was governed by TWA's "Working Agreement" with the Air Line Pilots Association ("ALPA"). Most of the pilots and first officers who desired to do so were able to downbid successfully to a flight engineer position before reaching age sixty and to continue in that position after reaching age sixty.

ALPA filed suit against TWA (hereinafter the "ALPA" action) maintaining that the policy of allowing anyone to work in the cockpit past age sixty breached the Working Agreement and the Railway Labor Act, 45 U.S.C. § 151, *et seq.* ("RLA"). In addition, several captains who were not able to downbid to flight engineer positions were mandatorily retired at age sixty and filed suit (hereinafter the "Thurston" action) challenging the policy under the ADEA.³

³ The Equal Employment Opportunity Commission ("EEOC") was allowed to intervene in the *Thurston* action as a plaintiff on behalf of other crew members who might be affected by TWA's policy.

Their complaint alleged that TWA's "age sixty" policy had not gone far enough to accommodate them and was unlawful under the ADEA.

The district court, in an opinion reported at 547 F. Supp. 1221 (S.D.N.Y. 1982), held in the *ALPA* action that TWA's elimination of its age sixty retirement policy for flight engineers was not a "major" dispute under the RLA. The court also held, over ALPA's objection, that an age under sixty for flight engineers was not a BFOQ within the meaning of 29 U.S.C. § 623(f)(1) of the ADEA, and that TWA had acted lawfully in employing persons over age sixty as flight engineers. Accordingly, the district court granted summary judgment to TWA in the *ALPA* action.

With regard to the *Thurston* action, the district court determined that none of the plaintiffs or EEOC claimants had demonstrated that a flight engineer vacancy existed at the time he applied for and was eligible for the job. Accordingly, the district court granted summary judgment for TWA in the *Thurston* action as well. In doing so, the court stated that:

From these undisputed facts these plaintiffs and claimants cannot establish a *prima facie* case of discrimination solely because no job vacancy existed at the time they applied and were eligible for the job. TWA was legally obligated to remove these pilots at age sixty under the FAA regulations. TWA was not obligated, however, to offer these ex-pilots jobs which did not exist. To the extent jobs existed, TWA was justified in relying upon a seniority bidding system. 547 F. Supp. at 1229 (citation omitted).

The court of appeals, in a decision reported at 713 F.2d 940 (2d Cir. 1983), unanimously affirmed the

district court decision in the *ALPA* action, holding that the elimination of the age sixty retirement policy for flight engineers did not violate the RLA.

In a divided opinion, however, the court of appeals reversed the district court decision in the *Thurston* action. Initially the court of appeals agreed with the district court that "[a]pplying the *McDonnell Douglas*⁴ formula here, it is clear, as the district court held, that appellants could not establish that there were flight engineer vacancies at the time they applied to transfer." 713 F.2d at 952. Nevertheless, the court stated that "[a] plaintiff is not barred by the *McDonnell Douglas* method from making out a *prima facie* case of age discrimination by alternative means, such as *direct* proof that an employer discriminates on the basis of age." *Id.* (Emphasis in original).

The court held that TWA's policy violated the ADEA, stating that:

In short, because TWA routinely accommodates other employees who seek to downgrade to flight engineer for non-age reasons and has failed to come forward with a permissible reason for its refusal to accord the same treatment to age-60 captains and first officers, the *Thurston* litigants and the EEOC must prevail on their ADEA claim. 713 F.2d at 955. (Footnote omitted).

The court also held that ALPA violated the ADEA by its role in the formulation and administration of the "age sixty" policy. 713 F.2d at 956. Despite finding ALPA liable for violations of the ADEA, the court

⁴ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

limited the relief against ALPA to injunctive relief, holding that the ADEA does not permit awards of back pay against a union. 713 F.2d at 957.

On the issue of liquidated damages,⁵ the court stated that "in a case based on discriminatory treatment, such as the present one, plaintiffs need not prove a specific intent to violate the ADEA; it is sufficient to establish that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." 713 F.2d at 956. Accordingly, the court ordered liquidated damages against TWA.

Judge Van Graafeiland dissented with respect to the portion of the opinion holding TWA liable in the *Thurston* action, stating that:

Apparently, TWA is the only trunk airline that voluntarily has permitted pilots over 60 to continue working as flight engineers. Instead of receiving commendation for what it has done, TWA is held liable as a matter of law for age discrimination. 713 F.2d at 957.⁶

⁵ See the discussion below regarding liquidated damages and the standard for an award of such damages.

⁶ TWA has fully briefed the issue of whether the ADEA requires an employer to accommodate employees for an age-related reason merely because it provides accommodation for non-age-related reasons. Therefore, it is not necessary for EEAC to repeat the persuasive arguments of TWA regarding this issue, in which EEAC fully concurs. Because of page limitations and in order more fully to address the remaining issues, EEAC has limited its brief to the other two issues.

SUMMARY OF ARGUMENT

The court below erred in holding that a "willful" violation of the ADEA may be established in the absence of a specific intent to violate the Act. That Congress provided for liquidated damages under the ADEA "*only* in instances of *willful* violations" indicates that more than a mere showing that age was a factor in an employment decision is required before liquidated damages may be awarded. "Willfulness" under the liquidated damages provision requires more than the mere intent to do the act that gave rise to the violation—it requires a specific intent to violate the Act.

The decisions of the First and Seventh Circuits in *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), and *Syvock v. Milwaukee Boiler Mfg. Co., Inc.*, 665 F.2d 149 (7th Cir. 1981), adopting a "specific intent" standard for liquidated damages are consistent with the Congressional purpose of awarding liquidated damages only against defendants who intentionally and consciously violate the Act. The focus of these decisions on the "state of mind" of the defendant at the time of the violation is consistent with the plain language and the legislative history of the liquidated damages provision of the ADEA and should be adopted by this Court. The "specific intent" test for liquidated damages also serves to further the "two-tier" approach to "willful" and "non-willful" violations envisioned by Congress.

Decisions of the lower courts that have declined to impose a specific intent requirement for awarding liquidated damages fail to consider that a "two-tier" statutory framework was established precisely to prevent an *automatic* award of liquidated damages.

The failure of these courts to require a "specific intent" standard will result in the virtual automatic doubling of damages, in direct contravention of Congressional intent.

The decision of the court below, which declined to award monetary damages against a union found to have violated the ADEA, ignores the clear intent of Congress to end age discrimination by both employers and unions. An award of monetary damages against a union found to be in violation of the ADEA is consistent with the statutory language and purposes of the Act and will serve the important purpose of deterring union discrimination. Without the likelihood of monetary liability, there is no effective deterrent to prevent unions from engaging in unlawful discrimination.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN FINDING A WILLFUL VIOLATION OF THE ADEA AND IN IMPOSING LIQUIDATED DAMAGES IN THE ABSENCE OF A SPECIFIC INTENT TO VIOLATE THE ACT

A. A "Specific Intent" Standard Is Most Consistent With The Statutory Scheme And The Intent Of Congress

The court of appeals below erred in holding that a "willful" violation of the ADEA may be found in the absence of a specific intent to violate the ADEA. The language of the opinion below renders double damages virtually automatic. The court stated that "[i]n a disparate treatment case . . . an employer's action, if taken *because of* an impermissible factor such as age, cannot be the result of negligence, mistake, or other innocent reasons." 713 F.2d at 956. (Emphasis in original).

The standard adopted by the court of appeals is contrary to the intent of Congress in limiting liquidated damages to instances of "willful" violations and to the better reasoned lower court decisions. Accordingly, the statutory distinction between "willful" and "non-willful" violations will be served best by a standard requiring a specific intent to violate the Act before liquidated damages are imposed.

The ADEA prohibits discrimination in the workplace based on age. Section 4(a), 29 U.S.C. § 623(a). The ADEA is enforced in accordance with the procedures provided under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, *et seq.*, with certain notable exceptions. Pursuant to Section 7(b) of the Act, 29 U.S.C. § 626(b),⁷ violations of the ADEA generally are to be treated as violations of the FLSA,

⁷ Section 7(b) reads in relevant part as follows:

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of *willful* violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. (Emphasis added).

with amounts owing as a result of a violation of the ADEA treated as "unpaid minimum wages or unpaid overtime compensation" under the FLSA. Section 7(b), 29 U.S.C. § 626(b).

In contrast to the automatic doubling of damages for violations of the FLSA, 29 U.S.C. § 216(b),⁸ the ADEA provides that "liquidated damages shall be payable only in cases of willful violations of this chapter." 29 U.S.C. § 626(b). Thus, it is clear that Congress, by restricting liquidated damages under the ADEA to "willful" violations of the Act, intended in plain statutory language to limit the awarding of liquidated damages in ADEA cases.⁹ In order to determine the extent of this limitation on liquidated damages under the ADEA, it is helpful to examine the legislative history surrounding the incorporation of the "willful" standard, as well as the cases that have interpreted that standard.

The legislative history of the ADEA liquidated damages provision evidences the intent of its sponsor and Congress to impose liquidated damages only where an employer acts with the specific intent to

⁸ 29 U.S.C. § 216(b) "[b]y its terms . . . requires that liquidated damages be awarded as a matter of right for violations of the FLSA." *Lorillard v. Pons*, 434 U.S. 575, 581 n.8 (1978). Section 11 of the Portal to Portal Pay Act, 29 U.S.C. § 260, provides that liquidated damages need not be paid if the employer shows that his act or omission was in good faith. To this limited extent, Section 11 mitigates the otherwise automatic doubling of damages under 29 U.S.C. § 216.

⁹ In *Lorillard v. Pons*, *supra*, 434 U.S. at 581, this Court noted with regard to liquidated damages that "Congress altered the circumstances under which such awards would be available in ADEA actions by mandating that such damages be awarded only where the violation of the ADEA is willful."

violate the Act. As originally proposed, the ADEA would have incorporated criminal penalties. 113 Cong. Rec. 2199 (1967). The substitution of the "willful" standard for liquidated damages was designed to serve the same purposes of deterring and punishing violators as the criminal provision would have served. See 113 Cong. Rec. 7076 (remarks of Sen. Javits).

In *Dean v. American Sec. Ins. Co.*, 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978), the Fifth Circuit had occasion to consider the purposes of the ADEA liquidated damages provision. In holding that punitive damages are not available under the ADEA, the court noted that:

It is quite apparent that Senator Javits, sponsor of the original bill and the amendments thereto which appear in the final enactment, held the view that liquidated damages could effectively supply the deterrent and punitive damages which both criminal penalties and punitive damages normally serve. 559 F.2d at 1040. (Footnote omitted).

The "specific intent" standard for finding a "willful" violation most closely carries out the intent of Congress that the provision "deter" and "punish" "willful" violators of the Act. That Congress, which was aware of the automatic double damage provision of the FLSA, provided liquidated damages under the ADEA "*only in instances of willful violations*" indicates that more than a mere showing that age was a factor in an employment decision is required before liquidated damages may be awarded. Thus, in contrast to the result below, "willfulness" under the liquidated damages provision should require more than the mere intent to do the act that gave rise to

the violation—it should require a specific and conscious intent to violate the Act.

As this Court noted in *Spies v. United States*, 317 U.S. 492, 497 (1943), “willful, as we have said, is a word of many meanings, its construction often being influenced by its context.” Thus, it is not surprising that the lower courts have reached conflicting conclusions regarding the meaning of the “willful” language in Section 7(b). Notwithstanding the varying results reached by the lower courts, it is submitted that a “specific intent” standard is most faithful to the purposes of the legislative scheme enacted by Congress and should be adopted by this Court.

In *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), the First Circuit had occasion to consider the meaning of “willfully” under the liquidated damages provision of the ADEA. The court stated that:

An act is done “willfully” if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law. 600 F.2d at 1020 n.27, quoting E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 14.06, at 384 (3d ed. 1977).

Consistent with the approach of the First Circuit in *Loeb v. Textron* is the decision of the Seventh Circuit in *Syvock v. Milwaukee Boiler Mfg. Co., Inc.*, 665 F.2d 149 (7th Cir. 1981). While pointing out that a finding of liability under the ADEA could be established without any showing as to the defendant’s state of mind, the court correctly observed that “by allowing liquidated damages only for a ‘willful’ violation, 29 U.S.C. § 626(b) (1976), Congress did not intend the doubling of damages to be automatic.”

665 F.2d at 154-55. The court found support for this proposition in the legislative history of the ADEA, stating that:

In fact, the legislative history of the ADEA suggests that the Congressional framers thought that non-willful discrimination directed towards an individual was quite possible. Unlike race discrimination, age discrimination may simply arise from an *unconscious* application of stereotyped notions of ability rather than from a deliberate desire to remove older employees from the workforce. 665 F.2d at 155. (Emphasis added).

With regard to the standard for determining willfulness under the Act, the Seventh Circuit held that:

The standard for willfulness therefore should focus on the defendant’s state of mind at the time the allegedly discriminatory acts occurred. It must distinguish those situations in which an employer *consciously* discriminates against an employee because of age from those in which the discrimination is unconscious. The distinction is just as necessary in disparate treatment cases as it is when the plaintiff sues on a discriminatory impact theory. We think that a finding of willfulness should lie only if there is some showing as to the defendant’s knowledge of the illegality of his actions. We hold that, in order to prove willfulness under 29 U.S.C. § 626(b) (1976), a plaintiff must show that the defendant’s actions were knowing and voluntary and that he knew or reasonably should have known that those actions violated the ADEA. 665 F.2d at 155-56. (Emphasis added and footnotes omitted).

The approach of the Seventh Circuit in *Syvoack*, focusing on the "state of mind" of the defendant, clearly maintains the "two-tier" approach to "willful" and "non-willful" violations envisioned by Congress. In this regard, the court noted that the showing that the defendant knew or reasonably should have known that its actions were inconsistent with the law:

[M]ust clearly be greater than that necessary for the initial finding of ADEA liability. The showing must be sufficient to indicate that the defendant's discrimination was not unconscious. *In a disparate treatment case, a finding of willfulness will generally require some direct evidence of discriminatory intent toward the plaintiff or a showing that, at the time of the alleged discriminatory action, the employer was motivated to discriminate or engaged in a pattern of discriminating against older employees.* 665 F.2d at 156 n.10 (emphasis added).

Thus, the holding in *Syvoack*¹⁰ that "direct evidence" or "compelling circumstantial evidence" of an intent to discriminate is required in order to award liquidated damages under the ADEA is consistent with the plain meaning of the statute, the intent of Congress and the First Circuit standard in *Loeb*.

¹⁰ The *Syvoack* standard was cited with approval in *Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743, 757-59 (7th Cir.), cert. denied, 104 S.Ct. 484 (1983). In addition, the "specific intent" standard was approved after careful discussion in *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1165-66 (S.D.N.Y. 1983); see also *Whittlesey v. Union Carbide Corp.*, 567 F. Supp. 1320, 1330 (S.D.N.Y. 1983). Both of these district court cases were decided prior to the Second Circuit's decision in the instant case.

In the instant case, the Second Circuit held that "plaintiffs need not prove a specific intent to violate the ADEA; it is sufficient to establish that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." 713 F.2d at 956. Citing no more than the fact that "TWA was clearly aware of the 1978 ADEA amendments," *id.* at 957, the court held TWA liable for liquidated damages. Liability for double damages based on such a minimal showing will result in virtually automatic doubling of damages in ADEA cases.

B. A Standard That Declines To Require "Specific Intent" Ignores Congressional Intent to Limit Liquidated Damages To Conscious Violations

In addition to the Second Circuit decision herein, a number of other lower courts have adopted varying standards for awarding liquidated damages which decline to impose a requirement of "specific intent" to violate the Act. Each of these decisions, however, fails to consider adequately that a "two-tier" statutory framework for back pay and liquidated damages was established by Congress precisely in order to prevent an *automatic* award of liquidated damages. Particularly in disparate treatment actions, such as the instant case, the failure of these courts to require a "specific intent" standard has resulted in the virtual automatic doubling of damages in direct contravention of Congressional intent.

A brief review of decisions adopting standards for "willful" violations in the absence of a specific intent to violate the Act clearly demonstrates the problems associated with such approaches. In *Wehr v. Bur-*

roughs Corp., 619 F.2d 276, 283 (3d Cir. 1980), the Third Circuit stated that:

[W]e conclude that Congress did not intend to restrict the meaning of "willful" . . . to intentional violations of the ADEA. It is sufficient to prove that the company discharged the employee because of age and that the discharge was voluntary and not accidental, mistaken, or inadvertent. In our view, it would also be sufficient to prove that the discharge was precipitated in reckless disregard of consequences.

Thus, the Third Circuit standard for willfulness does not require a "specific intent" to violate the Act and allows willfulness to be shown by a *reckless disregard of the consequences* of the defendant's action. Such a standard is inconsistent with common meanings of the term "willful" and is likely to result in the nearly automatic award of liquidated damages, since it fails to focus on the state of mind of the defendant at the time of the violation.¹¹

In *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1113-14 (4th Cir.), *cert. denied*, 454 U.S. 860 (1981),

¹¹ The Third Circuit's standard also is inconsistent with its own definition of "willfulness" established in the context of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.*, where the court stated that:

Willfulness connotes defiance or such reckless disregard of consequences as to be equivalent to a knowing, conscious and deliberate flaunting of the Act. Willful means more than merely voluntary action or omission—it involves an element of obstinate refusal to comply. *Frank Irey, Jr., Inc. v. OSHRC*, 519 F.2d 1200, 1207 (3d Cir. 1974), *aff'd in banc*, 519 F.2d 1215 (1975), *aff'd on other grounds sub nom. Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977).

and *Crosland v. Chariotte Eye, Ear and Throat Hosp.*, 686 F.2d 208, 217 (4th Cir. 1982), the Fourth Circuit has adopted the standard that "an employer acts willfully and subjects himself to [liability] if he knows or has reason to know, that his conduct is governed by [the Act]." Since nearly all employers will "know" or "have reason to know" that their conduct is "governed by the Act," the approach of the Fourth Circuit is particularly likely to result in an award of liquidated damages if used as an instruction to a jury, even where the defendant's actions were not "willful" as that term was intended by Congress and as it is commonly understood.

In *Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176, 1184 (6th Cir. 1983), the Sixth Circuit determined that it was not necessary for the plaintiff to show that a defendant acted with a specific intent to violate the Act. 696 F.2d at 1184. Rather, the court adopted the following standard for demonstrating "willfulness":

We hold that in order to show willfulness, an ADEA plaintiff must show that the employer's actions were voluntary and intentional. The employer is not necessarily shielded from liability because he is unaware of the "implications of his actions under the Act." Alternatively, the plaintiff may receive liquidated damages if he shows that the employer was reckless in not knowing that his actions were governed by the ADEA or that the employer acted in reckless disregard of whether his actions were covered by the ADEA. 696 F.2d at 1184. (Footnote omitted).

Although the court in *Blackwell* stated that "every showing of intentional discrimination does not entitle

the plaintiff to liquidated damages," *id.*, the failure of the court to require specific intent virtually mandates an award of liquidated damages, even in cases in which Congress clearly did not intend such awards.

Finally, in *Kelly v. American Standard, Inc.*, 640 F.2d 974 (9th Cir. 1981), the Ninth Circuit noted that "the award of liquidated damages is in effect a substitution for punitive damages and is intended to deter *intentional* violations of the ADEA." 640 F.2d at 979 (emphasis added). Despite this acknowledgment, the court declined to impose a "specific intent" requirement and found that "an ADEA plaintiff who establishes a knowing and voluntary violation of the Act is entitled to liquidated damages." *Id.* at 980. Like the other standards that fail to incorporate a showing that the ADEA violation was "conscious" or with the "specific intent" to violate the Act, the Ninth Circuit standard makes it highly likely that liquidated damages will be imposed without the requisite showing of "willfulness" that Congress intended.¹²

In disparate treatment actions, such as the instant case, the approaches outlined above have resulted in the nearly automatic imposition of liquidated dam-

¹² One commentator has noted the problems associated with a standard, such as that adopted by the Second Circuit herein, that does not require proof of "specific intent" to violate the Act. The commentator noted correctly that under such a standard:

[A]n employer would be guilty of a willful violation if he intended to discharge the employee, even if he did not mean to violate the Act. Under this construction, virtually every violation would be willful. Smith & Leggette, *Recent Issues in Litigation Under the Age Discrimination in Employment Act*, 41 Ohio St. L. J. 349, 369 (1980).

ages where a violation of the Act is found.¹³ For example, in awarding liquidated damages in an ADEA case, the Second Circuit in *Goodman v. Heublein, Inc.*, 645 F.2d 127, 131 n.6 (2d Cir. 1981), stated that:

In finding, under proper instructions, that Heublein had denied Goodman a promotion *because of age*, the jury necessarily concluded that Heublein's action was intentional. In a discriminatory treatment case, such as this, an employer's action, if taken *because of* an impermissible factor such as age, cannot be the result of negligence, mistake, or other innocent reason. On the other hand, in a discriminatory impact case, where an employer acts on the basis of some standard that is shown, in practice, to have a disproportionate impact on some group identifiable by a characteristic such as age, a finding of liability will not inevitably mean that the employer discriminated intentionally. (Emphasis in original).

The Second Circuit reaffirmed its adherence to automatic liquidated damages, at least in disparate treatment cases, in the instant case. 713 F.2d at 956.¹⁴

¹³ In *Cowen v. Standard Brands, Inc.*, 572 F. Supp. 1476 (N.D. Ala. 1983), the court found "no material difference between 'intentional' discrimination and 'willful' discrimination," 572 F. Supp. at 1581, and determined that "as a practical matter, liquidated damages are virtually automatic if there is to be any monetary recovery at all by the employee." *Id.*

¹⁴ The importance of requiring a "specific intent" standard for liquidated damages and of not automatically awarding such damages in disparate treatment cases is enhanced by the continuing debate over the appropriateness of using a "disparate impact" theory in ADEA cases. EEOC concurs with several scholars who have argued that the disparate impact doctrine should not be applied in age discrimination cases be-

The approaches to liquidated damages in disparate treatment cases of the First and Seventh Circuits in *Loeb* and *Syvock* are more consistent with the "two-tier" statutory scheme established by Congress. As noted above, the Seventh Circuit held in *Syvock* that "[i]n a disparate treatment case, a finding of willfulness will generally require some direct evidence of discriminatory intent toward the plaintiff or a showing that, at the time of the alleged discriminatory action, the employer was motivated to discriminate or engaged in a pattern of discriminating against older employees." 665 F.2d at 156 n.10. The court rejected an automatic award of liquidated damages in disparate treatment cases, stating that "[w]e find nothing in 29 U.S.C. § 626(b) (1976), or in the legis-

cause the Act prohibits only *intentional* discrimination, which is properly analyzed under the disparate treatment theory. See, e.g., A. Blumrosen, *Interpreting the ADEA: Intent or Impact*, in *Age Discrimination in Employment Act: A Compliance and Litigation Manual for Lawyers and Personnel Practitioners* 68 (1982); Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837 (1982). As Justice Rehnquist noted in his dissent to the denial of certiorari in *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981), "[t]his Court has never held that proof of discriminatory impact can establish a violation of the ADEA, and it certainly has never sanctioned a finding of a violation where the statistical evidence revealed that a policy, neutral on its face, has such a significant impact on all candidates concerned, not simply the protected age group." 451 U.S. 945, 948 (Rehnquist, J., dissenting). If ADEA cases are limited to intentional discrimination, the automatic award of liquidated damages in disparate treatment cases would wholly undermine the "two-tier" approach to liquidated damages, contrary to the intent of Congress. In any event, it is not necessary for the Court to decide herein the issue of whether the ADEA properly is limited to allegations of disparate treatment, since this is a disparate treatment case.

lative history of the ADEA, to support such a result." *Id.* at 155.¹⁵ It is submitted that Congress did not intend that liquidated damages would be awarded automatically in disparate treatment cases and that the requirement of a "specific intent" to violate the Act more accurately reflects Congress' wishes.

The problems inherent in any approach to liquidated damages that does not require a showing that the employer specifically intended to violate the Act are aptly demonstrated by the instant case. Following the 1978 amendments to the ADEA, TWA altered its previous policy regarding the retirement at age sixty of "flight engineers." This action was taken by TWA in a conscious effort to *comply* with the Act. In addition, with its revised policy, TWA became the only trunk airline voluntarily to permit pilots over age sixty to continue working as flight engineers. Congress could not have intended liquidated damages to be awarded in such an instance, where the employer expressly took steps beyond those taken by its competitors to insure that it would be in compliance

¹⁵ The court stated that simply because the jury did not accept the employer's justifications and rather found such justifications to be a pretext for discrimination did not warrant an inference that the employer acted "consciously." *Id.* at 157. In doing so, the court explained that:

Age discrimination resulting from unconscious stereotyping of an older person's abilities violates the ADEA although it may not have occurred with the state of mind necessary to a finding of willfulness. Yet it is likely that an employer will attempt to offer a legitimate reason for its actions at trial to avoid liability in the first instance. Because the defendant's trial explanation is not believed does not mean that its original actions were in fact consciously discriminatory. *Id.*

with the law. If liquidated damages can be awarded under these circumstances, it is clear that the "standard" of "willfulness" adopted by the Second Circuit is in effect a "standard" of automatic doubling of damages in any case where a violation of the Act is found to exist.

II. A UNION FOUND TO HAVE VIOLATED THE ACT SHOULD BE HELD ACCOUNTABLE FOR MONETARY DAMAGES

The Second Circuit herein held that the ADEA "does not permit actions to recover monetary damages, including back pay, against a labor organization." 713 F.2d at 957. In doing so, the court ignored the clear intent of Congress to end age discrimination by both employers *and unions* and the strong policy reasons favoring such awards against unions. It is submitted that a monetary award against unions found to be in violation of the ADEA is consistent with the statutory language and purposes of the Act and will serve the important purpose of deterring union discrimination.

It is undisputed that labor organizations are prohibited by the ADEA from discriminating on the basis of age. Section 4(c) of the ADEA, 29 U.S.C. § 623(c), expressly makes it unlawful for a labor organization "to discriminate against . . . any individual because of his age." See also 29 U.S.C. §§ 623 (d) and (e). In addition, the legislative history clearly is expressive of the intent of Congress to prohibit age discrimination by labor organizations. See, e.g., 113 Cong. Rec. 2467 (remarks of Sen. Yarborough); 113 Cong. Rec. 34,740 (remarks of Rep. Perkins); 113 Cong. Rec. 34,743 (remarks of Rep. Kelly) (1967). Thus, there are compelling reasons

in the statutory prohibitions and legislative history of the ADEA for holding unions liable for monetary damages for proven violations of the Act.¹⁶

In addition to the legislative history and the provisions of the ADEA prohibiting discrimination by labor organizations, the language of the remedy provision of the ADEA supports an award of monetary damages against unions. Section 7(b) of the ADEA, 29 U.S.C. § 626(b), provides in pertinent part that:

In any action brought to enforce this chapter the court shall have jurisdiction to grant *such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter*, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

As noted above, since the legislative history clearly reveals that an important "purpose" of the Act was

¹⁶ In *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77 (1981), this Court held that an employer had neither a federal statutory right under Title VII or the Equal Pay Act nor a federal common law right to *contribution* from a union that allegedly bore at least partial responsibility for the statutory violations. That case, however, involved a claim for contribution brought by an *employer* against a union and is not instructive of the issue presented in the instant case. In *Northwest Airlines*, this Court stated that:

Because we conclude that no right to contribution exists under either the statute or the federal common law, we need not decide whether the elements of a contribution claim have been established in this case. Therefore, we need not and do not decide the question whether employees have an implied right of action for backpay against their unions for violations of the Equal Pay Act. 451 U.S. at 88 n.20.

to prevent union discrimination, a monetary award against union violators logically falls within the language of the Act providing for "such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter."

Although there have been few cases addressing the issue of union liability for monetary relief under the ADEA, it is submitted that the reasoning most consistent with the legislative purpose of ending union discrimination on the basis of age is contained in *EEOC v. Air Line Pilots Ass'n*, 489 F. Supp. 1003 (D. Minn. 1980), *reversed on other grounds*, 661 F.2d 90 (8th Cir. 1981). In that case, the district court rejected the argument of ALPA that the employer alone is responsible for monetary awards under the ADEA. The court first "noted that ALPA has cited the court to nothing in the legislative history of the ADEA suggesting unions should be immune from damages liability, and the court also has found no such indication in the Act's legislative history or in any case law under the Act." 489 F. Supp. at 1009 n.5. Noting the language of Section 626(b), cited above, the court stated that "[i]t would not effectuate the purposes of the ADEA to allow unions to violate the act without having to be concerned with being held liable for any resulting monetary damages." *Id.* (Footnote omitted). In holding the union liable for monetary damages, the court also relied on "analogous case law under Title VII." ¹⁷ *Id.*

¹⁷ See, e.g., *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1300 (8th Cir. 1978); *Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876, 881 (8th Cir. 1977), *cert. denied*, 434 U.S. 891 (1977).

A monetary award against unions found to have violated the Act best serves the Congressional intent of eliminating age discrimination by unions and is most consistent with decisions under analogous statutory schemes.¹⁸ Without the likelihood of monetary liability, there is no effective deterrent to prevent unions from engaging in unlawful discrimination.¹⁹

¹⁸ In *Hodgson v. Sagner, Inc.*, 326 F. Supp. 371 (D. Md. 1971), *aff'd sub nom. Hodgson v. Baltimore Regional Joint Board*, 462 F.2d 180 (4th Cir. 1972), a case brought under the Equal Pay Act, the court held that a union that had jointly violated the Equal Pay Act was liable for back wages due. In so holding, the court stated that:

If [the union's] position were correct, a union which had caused an employer to illegally withhold wages from its employees would be subject to no more than future restraint. Its past violation of the law would go uncorrected and unpunished; it could merely be prevented from breaking the law in the future. There is no apparent reason why a union which violated Section 206(d) should be treated any differently from an employer violator. Equitably, both should be subject to the same type of decree which in order to give full relief would necessarily include a provision requiring the payment of wages illegally withheld or caused to be withheld as well as one prohibiting any future violations of the law. 326 F. Supp. at 373.

This reasoning in an analogous situation under the Equal Pay Act is equally persuasive in the instant ADEA case.

¹⁹ The importance of providing "incentives" for unions to comply with the law was recognized last term in a different context in *Bowen v. U.S. Postal Service*, 103 S.Ct. 588, 597 (1983), where this Court noted that:

In the absence of damages apportionment where the default of both parties contributed to the employee's injury, incentives to comply with the grievance procedure will be diminished.

See also *Vaca v. Sipes*, 386 U.S. 171 (1967).

Given the Congressional intent to prohibit such discrimination, the language of Section 626(b) itself, and the need for such a deterrent to unlawful discrimination, it is submitted that a union that has engaged in unlawful discrimination under the ADEA should be held liable for monetary damages.²⁰

CONCLUSION

For the foregoing reasons, it is submitted that the decision of the Second Circuit herein should be reversed.

Respectfully submitted,

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May 17, 1984

²⁰ In *Neuman v. Northwest Airlines*, 28 FEP Cases 1488 (N.D. Ill. 1982), the court held that a plaintiff was not entitled to recover monetary damages from ALPA under the ADEA. In doing so, the court relied principally on decisions under the FLSA and failed to accord appropriate weight to the legislative history of the ADEA, the language of Section 626 itself and the need for an effective deterrent to union discrimination. It is submitted that the decision in *EEOC v. Airline Pilots Ass'n* is more consistent with the intent of Congress and should be endorsed by this Court.

11 10
Nos. 83-997, 83-1325

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,
Petitioner,
v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A.
PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COM-
MISSION AND AIR LINE PILOTS ASSOCIATION, INTERNA-
TIONAL,
Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,
v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A.
PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COM-
MISSION AND TRANS WORLD AIRLINES, INC.,
Respondents.

On Writs of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF OF AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL
Petitioner in No. 83-1325

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QUESTION PRESENTED

Whether airline captains who are subject to a bona fide occupational qualification (BFOQ) under § 4(f)(1) of the Age Discrimination in Employment Act may be retired, where the plain meaning and legislative history of § 4(f)(1) authorize mandatory retirement at an age which is a BFOQ.

PARTIES

Air Line Pilots Association, International, Trans World Airlines, Inc., Harold H. Thurston, Christopher J. Clark, C. A. Parkhill and the Equal Employment Opportunity Commission are parties to the decision sought to be reviewed here. In addition Nicholas Vasilaros, *et al.*, were intervenors in a consolidated case in the court below, as to which review by this Court has not been sought.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-997, 83-1325

TRANS WORLD AIRLINES, INC.,
Petitioner,
v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A.
PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COM-
MISSION AND AIR LINE PILOTS ASSOCIATION, INTERNA-
TIONAL,
Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,
v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A.
PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COM-
MISSION AND TRANS WORLD AIRLINES, INC.,
Respondents.

On Writs of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF OF AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL
Petitioner in No. 83-1325

PRELIMINARY STATEMENT

Air Line Pilots Association, International ("ALPA"), petitioner in No. 83-1325 and respondent in No. 83-997, respectfully submits this brief on the merits as petitioner in No. 83-1325.¹

¹ Cases No. 83-997 and No. 83-1325 were consolidated pursuant to an order of this Court entered on April 2, 1984 (52 U.S.L.W. 3720).

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 713 F.2d 940 and appears in the appendix to the petition for certiorari of Trans World Airlines, Inc. ("TWA") in No. 83-997 beginning at page A-1. The opinion of the United States District Court for the Southern District of New York is officially reported at 547 F.Supp. 1221 and appears in the same appendix beginning at page A-44.

JURISDICTION

This Court's jurisdiction exists by virtue of 28 U.S.C. § 1254(1). TWA petitioned this Court for a writ of certiorari in order to review the judgment and opinion of the United States Court of Appeals for the Second Circuit. ALPA subsequently filed a conditional cross-petition. Both petitions were filed within 90 days of the denial of rehearing by the Court of Appeals. TWA's petition was granted on February 27, 1984 (52 U.S.L.W. 3631), and ALPA's petition was granted on April 2, 1984 (52 U.S.L.W. 3720).

STATUTES AND REGULATION INVOLVED

Section 4(a) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a), provides:

It shall be unlawful for an employer—

- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
- (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

- (3) to reduce the wage rate of any employee in order to comply with this chapter.

Section 4(c) (3) of the ADEA, 29 U.S.C. § 623(c) (3), provides:

It shall be unlawful for a labor organization—

- (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 4(f) of the ADEA, 29 U.S.C. § 623(f), provides:

It shall not be unlawful for an employer, employment agency or labor organization—

- (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;
- (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631 of this title because of the age of such individual; or
- (3) to discharge or otherwise discipline an individual for good cause.

Section 12(a) of the ADEA, 29 U.S.C. § 631(a), provides:

- (a) The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

Part 121.383(c) of the Federal Air Regulations, 14 C.F.R. § 121.383(c), provides:

No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.

STATEMENT OF THE CASE

A. TWA's Employment of Flight Deck Crew Members

ALPA is the authorized bargaining representative under the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.*, for the approximately 3,000 flight deck crew members employed by TWA, A-4—A-6,² who serve in the positions of captain, first officer, international relief officer ("IRO") (on a few overseas routes) and flight engineer. J.A. 339. The terms and conditions of employment of crew members are governed by collective bargaining agreements ("Working Agreements") between TWA and ALPA. A-8.

Seniority is based on length of service as a crew member and governs the allocation of work assignments as well as transfers from one position to another. J.A. 294, 302-314. Flight engineer is the entry position for TWA flight deck employment, although certain "career" flight engineers hired prior to 1962 have priority rights to

² References to "A-" are to the decision of the Second Circuit Court of Appeals which appears in the Appendix to TWA's petition for certiorari filed December 16, 1983. References to "J.A." are to the Joint Appendix filed in the Second Circuit pursuant to permission of this Court by order dated March 19, 1984 (52 U.S.L.W. 3687); all parties have agreed to cite to the Joint Appendix below.

flight engineer positions. J.A. 210-214. In accordance with the seniority system embodied in the Working Agreement, a captain may bid for vacancies in the flight engineer position, J.A. 305; in specified circumstances he may also displace a less senior incumbent flight engineer, J.A. 311. Seniority rights are extinguished when a crew member's services are terminated, whether by discharge, resignation or retirement. J.A. 294.

The Federal Aviation Administration ("FAA") prohibits flight deck crew members from serving as "pilots" (captains) and "co-pilots" (first officers) once they reach age 60. 14 C.F.R. § 121.383(c) ("Age 60 Rule"). See generally *Rombough v. FAA*, 594 F.2d 893 (2d Cir. 1979). The FAA does not set a maximum age limit for flight engineers. A-7. It is undisputed in this action that an age less than 60 is a bona fide occupational qualification ("BFOQ") for TWA captains and first officers under § 4(f)(1) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(f)(1). A-7—A-8.

B. TWA's Retirement Practices

From the issuance of the FAA Age 60 Rule in 1959 to August, 1978, TWA retired all flight deck crew members (including flight engineers) at age 60, as allowed by § 4.2 of the collectively bargained retirement plan (which requires crew members to retire at their normal retirement dates [age 60], "unless written approval of the company is granted for continuance in employment"). J.A. 243, 410.

The 1978 amendments to the ADEA, effective April 6, 1978, eliminated a bona fide employee benefit plan defense to mandatory retirement at age 60. Pub. L. No. 95-256, § 2(a), 92 Stat. 189 (1978). In August, 1978, TWA decided to permit flight engineers to continue in their jobs past age 60, but did not change its policy of retiring captains and first officers when they were sub-

ject to the FAA Age 60 Rule. J.A. 425. TWA applied its policy change retroactively by re-employing any flight engineer who had reached age 60 on or after April 6, 1978. A-9.

C. Procedural History

TWA's policy was challenged in two lawsuits. In *Thurston v. TWA*, three TWA captains who requested to serve as flight engineers after their 60th birthdays but were retired at age 60, brought an action against TWA and ALPA for violation of the ADEA; intervenor EEOC represents an additional 7 former captains who were also involuntarily retired after April 6, 1978.³ A-10 n.10. *Thurston* was consolidated with *ALPA v. TWA*, an action challenging the August, 1978, policy permitting service of flight engineers beyond age 60 as a unilateral change in working conditions contrary to § 2, Seventh and § 6 of the RLA, 45 U.S.C. § 152, Seventh and § 156.

The district court entered summary judgment against individual plaintiffs and the EEOC in *Thurston v. TWA*, and entered summary judgment in favor of TWA in *ALPA v. TWA*.

The Court of Appeals reversed the judgment in *Thurston*, and entered summary judgment in favor of plaintiffs. With respect to "[t]he employment practice at issue in this lawsuit—the severing of age 60 captains from the company," the court held that "because TWA routinely accommodates other employees who seek to downgrade to flight engineer for non-age reasons and has failed to come forward with a permissible reason for its refusal to accord the same treatment to age-60 captains and first officers, the *Thurston* litigants and the EEOC claimants

³ Three of these 10 captains reached age 60 prior to August 1978; four of the captains reached age 60 between August and November, 1978. One reached age 60 in 1979; one reached age 60 in 1980; one reached age 60 in 1981. See TWA Brief at 13 n.16.

must prevail on their ADEA claims." A-26, 31. The court further held that ALPA violated § 4(c)(3) of the ADEA, 29 U.S.C. § 623(c)(3). The court rejected ALPA's argument that § 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1), authorized TWA to retire captains and first officers at an age which is a BFOQ.⁴ The Court of Appeals affirmed the judgment in *ALPA v. TWA*; ALPA has not sought review of that decision.

SUMMARY OF ARGUMENT

TWA correctly asserts that its August, 1978, policy does not discriminate on the basis of age, and that the district court therefore properly entered summary judgment in favor of defendants. TWA Brief at 16-29. ALPA agrees that TWA's policy complies with § 4(a) of the ADEA, and further submits that § 4(f)(1) of the ADEA authorizes an employer "to take any action otherwise prohibited under [§ 4(a)] . . . where age is a [BFOQ]" An age less than 60 is a BFOQ for TWA captains. "[A]ny action otherwise prohibited" includes mandatory retirement. Accordingly, TWA lawfully retired the individual plaintiffs and EEOC claimants, who were employed as captains when they turned 60.

The Second Circuit ruled that "involuntary retirement" at an age which is a BFOQ is lawful in some circumstances but not in others, A-30, depending on the employer's treatment of employees who are unable to continue to work in a particular job for "non-age reasons." A-31. However, the legislative history of the ADEA demonstrates that Congress intended to authorize the "retirement" of employees at an age which is a BFOQ, and offers no support for a distinction between

⁴ The Court of Appeals also ruled that ALPA was not responsible to plaintiffs for monetary damages as a matter of law. A-38. This Court has granted TWA's petition for certiorari (opposed by plaintiffs) on this issue in 83-997. ALPA will brief this issue as respondent in No. 83-997.

permissible and impermissible use of mandatory retirement based on policies applicable to employees in other circumstances. In the light of the plain meaning of the statutory language and the legislative history explicitly approving mandatory "retirement" at an age which is a BFOQ, § 4(f)(1) should be read to authorize TWA's involuntary retirement of captains at age 60.

ARGUMENT

SECTION 4(f)(1) OF THE ADEA AUTHORIZED TWA TO CONTINUE ITS POLICY OF RETIRING PILOTS WHO WERE SUBJECT TO AN AGE-BASED BONA FIDE OCCUPATIONAL QUALIFICATION.

A. In 1978, Congress Restricted the Permissible Range of Mandatory Retirement Practices, But Continued to Authorize Mandatory Retirement at an Age Which Is a BFOQ.

Section 4(a) of the ADEA prohibits an employer from discharging an individual because of age and § 4(c)(3) makes it unlawful for a labor organization to cause or attempt to cause an employer to discriminate in violation of § 4. 29 U.S.C. §§ 623(a), 623(c)(3). Section 4(f) of the ADEA defines the scope of authorized employment practices. Section 4(f)(3) specifies that an employer may "discharge" or "discipline an individual for good cause." 29 U.S.C. § 623(f)(3). As enacted in 1967, § 4(f)(2) specified that it shall not be unlawful "to observe the terms" of a bona fide seniority system or employee benefit plan. Pub. L. No. 90-202, § 4(f)(2), 81 Stat. 602, 603. Section 4(f)(1) was written in broader terms: it provided that "[i]t shall not be unlawful for an employer . . . or labor organization to take any action otherwise prohibited . . . [under §§ 4(a), (b), (c), or (e)] where age is a [BFOQ] or where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). The only express restriction on the scope of

the far-reaching language of § 4(f)(1) is that it does not apply to actions prohibited by § 4(d) of the ADEA, 29 U.S.C. § 623(d) (which bars discrimination based on opposition to unlawful practices or participation in the investigation of unlawful practices).

In the 1978 ADEA amendments, Congress prohibited mandatory retirement practices justified solely by a seniority system or employee benefit plan, by modifying § 4(f)(2) to state that "no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual."⁵ 29 U.S.C. § 623(f)(2). At the same time, Congress decided to continue *unchanged* the authorization "to take any action otherwise prohibited . . . where age is a [BFOQ]." Significantly, Congress did not amend § 4(f)(1) to add a restriction on mandatory retirement similar to the proviso added to § 4(f)(2).

In clarifying the 1978 amendments to § 4(f)(2), Congress emphasized that employers could continue to retire employees subject to a BFOQ. The Senate adopted an amendment to § 4(f)(1) providing that an employer or labor organization "may take any action otherwise prohibited [by the ADEA] . . . *including the establishment of a mandatory retirement age less than [age 70]* . . . where age is a [BFOQ]."⁶ In Conference Committee, the

⁵ Pub. L. No. 95-256, § 2(a), 92 Stat. 189 (1978). In 1978, Congress also extended the coverage of the Act to age 70, Pub. L. No. 95-256, § 3(a), 92 Stat. 189 (1978), and added exemptions for "compulsory retirement" of certain persons after age 65 who are in an "executive or high policy-making position." *Id.* Congress also added an exemption for "compulsory retirement" of any person after age 65 "who is serving under a contract of unlimited tenure . . . at an institution of higher education. . . ." *Id.*, 92 Stat. 190. Section 3(b)(3) of the 1978 ADEA amendments repealed the latter provision as of July 1, 1982. Pub. L. No. 95-256, § 3(b), 92 Stat. 190.

⁶ S. Rep. No. 493, 95th Cong., 1st Sess. 11, 24 (1977) (hereinafter "S. Rep."), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 504, 514 (proposed amendments in italics).

Senate conferees withdrew the amendment because "the conferees agreed that the amendment *neither added to nor worked any change upon present law.*"⁷ See A-27.

The House Committee Report expressed an intent both to *permit* "mandatory retirement or other employment practices" where age is a BFOQ, and *not* to require the use of alternative procedures to mandatory retirement:

While it is the primary purpose of this legislation to limit mandatory retirement and other employment discrimination for non-Federal employees aged 40-69, and to prohibit unreasonable mandatory retirement with respect to Federal employment, *it is not intended that the bill prohibit mandatory retirement or other employment practices where age is a bona fide occupational qualification reasonably necessary to the normal operation of a particular activity such as provided for in the current law in section 15(b) and 4(f)(1).* It is recognized that certain mental and physical capacities may decline with age, and in some jobs with unusually high demands, age may be considered a factor in hiring and retaining workers.

* * *

This legislation does not require employers to provide special working conditions for older workers to allow them to remain or become employed. *While special jobs, part-time employment, retraining and transfers to less physically demanding jobs may be of great benefit to the older employees and the employer alike, these activities are not required by this legislation.*

H.R. Rep. No. 527 (Pt. 1), 95th Cong., 1st Sess. 12 (1977) (hereinafter "H.R. Rep.") (emphasis added).

Moreover, the floor debates in the House and Senate confirm that Congress fully intended to exempt employ-

⁷ H. Conf. Rep. No. 950, 95th Cong., 2d Sess. 7 (1978), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 528, 529 (emphasis added).

ees subject to a BFOQ from the Act's prohibitions against mandatory retirement. Rep. Weiss, one of the authors of the 1978 amendments, stated:

Currently, there are three exceptions to the act. First, Section 4(f)(1) *exempts workers in hazardous occupations from the protections of the act.* Second, section 4(f)(3) states that a worker, although covered by the act, can be discharged for good cause. No one can dispute the intent of these two exceptions.

123 Cong. Rec. 30,566 (1977) (emphasis added).⁸ Senator Williams, a floor manager of the 1978 amendments in the Senate and the author of the Senate's proposed amendment to § 4(f)(1), explained that his amendment would confirm that once a BFOQ had been established, "an employer may lawfully require mandatory retirement at that specified age." 123 Cong. Rec. 34,296 (1977).⁹

Congress' understanding of the term "retirement" is not open to doubt. As a matter of its ordinary meaning and usage,¹⁰ "retirement" refers to the complete termination of the employment relationship. It is "commonly ac-

⁸ Following the Conference Committee's consideration of the amendments, Rep. Weiss reiterated that: "Section 4(f)(1) of the ADEA exempts situations in which age is a bona fide occupational exception [sic] . . . there is universal acceptance of [this] provision." 124 Cong. Rec. 7886-7887 (1978).

⁹ See also 123 Cong. Rec. 34,297, 34,318-319 (1977) (remarks of Sen. Javits).

¹⁰ See *Perrin v. United States*, 444 U.S. 37, 42 (1979) (words that Congress has used are to be given their "ordinary, contemporary, common meaning" unless otherwise defined); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) (where Congress uses terms that have accumulated a "settled" meaning, it must be assumed that Congress intended to incorporate that meaning).

cepted . . . in industrial relations”¹¹ that “retirement” encompasses the elimination of all employment rights. An employee who retires from his job on November 30, 1984, would not expect to report to work for assignment to another position in the same company on December 1, 1984. This Court has held that retired employees cannot be members of a bargaining unit certified by the National Labor Relations Board precisely because retirement, in contrast to lay-off or leave, involves the termination of any expectation of future employment. *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 165-66, 168 (1971).¹²

That retirement refers to termination from employment was also recognized in the Report of the Secretary of Labor, *The Older American Workers: Age Discrimina-*

¹¹ *California Brewers Association v. Bryant*, 444 U.S. 598, 605 (1980). “Title VII does not define the term seniority system, and no comprehensive definition of the phrase emerges from the legislative history of § 703(h). . . . It is appropriate, therefore, to begin with commonly accepted notions about ‘seniority’ in industrial relations, and to consider those concepts in the context of Title VII and this country’s labor policy.” 444 U.S. at 605. Indeed, the meaning of “mandatory retirement” is far more precise than “seniority,” which applies to a vast range of employment practices used to take length of service into account in making employment decisions. See generally Aaron, *Reflections on the Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532 (1962).

¹² *Accord United Mine Workers of America Health and Retirement Funds v. Robinson*, 455 U.S. 562, 574-75 (1982). See also *Inland Steel Co. v. NLRB*, 170 F.2d 247, 251-52 (7th Cir. 1948), cert. denied in relevant part, 336 U.S. 960 (1949), otherwise aff’d, 339 U.S. 382 (1950) (compulsory retirement practices are a mandatory subject of bargaining in part because they result in elimination of seniority rights embodied in collective bargaining agreement). See generally *Roberts v. Lehigh & New England Railroad*, 323 F.2d 219, 221 (3d Cir. 1963) (union’s negotiation of mandatory retirement provision eliminating accrued seniority rights did not violate the Railway Labor Act); *McMullens v. Kansas, Oklahoma and Gulf Railroad*, 229 F.2d 50, 53-55 (10th Cir.), cert. denied, 351 U.S. 918 (1956); *Goodin v. Clinchfield Railroad*, 125 F.Supp. 441, 448 (E.D. Tenn. 1954), aff’d, 229 F.2d 578 (6th Cir.), cert. denied, 351 U.S. 953 (1956).

tion in Employment (1965) (“Report”), which played a significant role in “the process of fact-finding and deliberation” leading to enactment of the ADEA. *EEOC v. Wyoming*, — U.S. —, 103 S.Ct. 1054, 1058 (1983). As part of its discussion of the effects of seniority systems on the hiring of older workers, the Report found that retirement results in the termination of seniority rights: “Although retirement, particularly early retirement, creates other types of problems, it brings to an end those of seniority protection and related on the job claims.” Report at 57-58 (emphasis added). The Report likewise informed Congress of the distinction between mandatory retirement policies, and alternative employment practices allowing transfer to less demanding positions. Report at 76, 88-89. This was the very distinction drawn by the 1977 House Committee Report, *supra*, p. 10, when it made clear that transfers were *not* required by the ADEA as an alternative to lawful mandatory retirement pursuant to 29 U.S.C. § 623(f)(1) or § 631(c).

“Retirement” is used in the 1978 amendments and throughout the legislative history to describe both what is to be prohibited¹³ and what is to be permitted,¹⁴ but its meaning does not change from one context to the other. The House Committee Report analyzed existing retirement practices in terms that unambiguously equated mandatory retirement with the termination of employment. H.R. Rep. at 2, 9-11. The Senate Committee Report, in relation to amending § 4(f)(2), likewise recognized that “forced retirement extinguishes an individual’s right to employment. . . .” S. Rep. at 10, reprinted in 1978 U.S. CODE CONG. & AD. NEWS, 504, 513 (emphasis added). The references in the Senate amendment and the Com-

¹³ See Pub. L. No. 95-256, § 2(a), 92 Stat. 189 (1978); 29 U.S.C. § 623(f)(2), § 631(a).

¹⁴ See Pub. L. No. 95-256, § 3(a), 92 Stat. 189-190 (1978); 29 U.S.C. § 631(c). The exemption for tenured faculty was repealed as of July 1, 1982, Pub. L. No. 95-256, § 3(b)(3), 92 Stat. 196 (1978).

mittee Reports, *supra*, pp. 9, 10, 13, to "mandatory retirement" as authorized by § 4(f)(1) have the same meaning that "retirement" has in these discussions concerning reasons for eliminating mandatory retirement in the context of amending § 4(f)(2).

The legislative history of the ADEA offers no support for the position expressed by the court below that Congress permitted mandatory retirement from a job subject to a BFOQ only where younger employees are terminated whenever they could no longer work in a particular job. *See* A-31. There are various situations in which an employee can no longer work in a particular position (temporary or permanent disability, inadequate performance, changed job requirements, temporary reduction in the workforce, permanent elimination of jobs), and a wide range of possible responses to each of these situations (paid or unpaid leave, layoff, lateral transfer, displacement of other employees, waiting lists, redesign of job requirements, priority rights to available or future vacancies, retraining, termination, part-time work). The position expressed by plaintiffs invites this Court to speculate that Congress was unaware of any of these employment practices or that, if it was aware, it simply neglected to make the distinction adopted by the court below. However, Congress enacted and discussed § 4(f)(1) in broad terms applicable across the entire spectrum of employers subject to the ADEA.

As demonstrated in the amendment to § 4(f)(2), Congress in 1978 was concerned with, and knew how to prohibit, the practice of mandatory retirement pursuant to employee benefit plans. With equal ease, Congress, had it chosen, could have prohibited reliance on a BFOQ to require retirement under § 4(f)(1). Congress could also have amended § 4(f)(1) to preclude mandatory retirement under a BFOQ where transfers or other accommodations have been made available to other employees. Rather, Congress expressed its approval of mandatory

"retirement" at an age which is a BFOQ, and made it clear that alternative policies were not required by the ADEA.

B. The Plain Meaning of § 4(f)(1), as Buttressed by the Legislative History of the ADEA, Authorizes the Mandatory Retirement of Pilots Disqualified by the FAA Age 60 Rule.

In matters of statutory construction, "it is appropriate to begin with the language of the statute itself." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 91 (1981). It is equally appropriate "to begin with the language of the statute" in construing statutory limitations to remedial legislation. *See Kosak v. United States*, — U.S. —, 104 S.Ct. 1519, 1523-1524 (1984); *INS v. Phinpathya*, — U.S. —, 104 S.Ct. 584, 589 (1984); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982).

This Court has noted on numerous occasions that "in all cases involving statutory construction, 'our starting point must be the language employed by Congress,' . . . and we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'"

INS v. Phinpathya, 104 S.Ct. at 589, quoting *American Tobacco Co. v. Patterson*, 456 U.S. at 68.

The language in § 4(f)(1), "to take any action otherwise prohibited . . . where age is a BFOQ," plainly encompasses the "action" of retiring an employee disqualified by an age-based BFOQ. *Cf. United States v. Rodgers*, — U.S. —, 52 U.S.L.W. 4510, 4511 (U.S. May 1, 1984) (prohibition of false statements with respect to "any matter" is "sweeping language"). Indeed, even the EEOC has acknowledged that "[i]f age is a 'bona fide occupational qualification,' [an employer] is free to impose a mandatory retirement age" ¹⁵

¹⁵ Brief of Appellant EEOC, at 13-14, *EEOC v. Wyoming*, — U.S. —, 103 S.Ct. 1054 (1984). *See* 103 S.Ct. at 1071 (Burger, C.J., dissenting).

Where the statute is unambiguous, the plain meaning of the statutory language must be applied. See *INS v. Phinpathya*, 104 S.Ct. at 589 (remedial provision applicable to an alien "who has been physically present in the United States for a continuous period of not less than seven years" should be literally applied, since "the ordinary meaning of these words does not readily admit of any 'exception[s]'"); *Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268, 274 (1980) ("Nor are we free to read the subsequent words 'all other cases' as though they described 'all of the foregoing' as well; the use of the word 'other' forecloses that reading."). See also *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 173 (1978). "[T]o take any action otherwise prohibited . . . where age is a [BFOQ]" must be read to authorize mandatory retirement at an age which is a BFOQ, since "[t]he language . . . [of the statute] is clear and admits of but one reasonable interpretation," *Dickman v. Commissioner*, — U.S. —, 104 S.Ct. 1086, 1089 (1984).

The court below inverted this procedure, and used what it perceived to be the purposes of the ADEA and § 4(f)(1) to define the meaning of the statutory language. A-28 - A-29. This Court requires greater deference to the Congressional choices embodied in statutory language. See *Mohasco Corp. v. Silver*, 447 U.S. 807, 813 (1980) (holding that 300 day filing limit under Title VII must be read literally, and rejecting the view of the Second Circuit that "a literal reading did not give sufficient weight to the overriding purpose of the Act."). See also *American Tobacco Co. v. Patterson*, 456 U.S. at 68.

The Second Circuit erroneously reasoned that the plain meaning of "take any action otherwise prohibited" is not applicable if it would result in an "expansive reading of

[29 U.S.C.] § 623(f)(1) . . . that would swallow the Act." A-29:

Under ALPA's interpretation, for example, a company could lawfully provide fewer retirement benefits to captains retiring at age 60 than to other retiring employees, simply because the position of captain is subject to an age 60 BFOQ.

Id. This Court has squarely rejected using extreme hypothetical examples to justify departing from the statutory language where the ordinary meaning of that language applies to the case before the court. *Dickman v. Commissioner*, 104 S.Ct. at 1093;¹⁶ *Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs*, 449 U.S. at 284.

Moreover, the court below failed to give the differences between § 4(f)(1) and the other sections of § 4(f) the decisive weight which they deserve. The decision acknowledged that "[29 U.S.C.] § 623(f)(2), unlike [29 U.S.C.] § 623(f)(1), contains an explicit prohibition of involuntary retirement on the basis of age," A-27, but considered

¹⁶ In *Dickman v. Commissioner*, petitioners challenged a construction of gift tax statutes to include interest-free demand loans as taxable gifts on the grounds, *inter alia*, that "[c]arried to its logical extreme . . . [this construction] would elevate to the status of taxable gifts such commonplace transactions as a loan of the proverbial cup of sugar to a neighbor or a loan of lunch money to a colleague." 104 S.Ct. at 1093. The Court found this "parade of horrors" to be unconvincing for two reasons, both of which apply to the Second Circuit's hypothetical. First, "[w]hen the government levies a gift tax on routine neighborly or familial gifts, there will be time enough to deal with such a case." *Id.* Second, the Court found that other statutory provisions would make the occurrence of these events extraordinarily unlikely. *Id.* As the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1053(a), provides that "an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age," it is equally unlikely that captains retiring at age 60 would be subject to age-based reductions in accrued pension benefits.

the absence of any limiting proviso in § 4(f)(1) to be unimportant. However, in *INS v. Phinpathya*, this Court considered the absence of any express limitation in § 244 (a)(1) of the Immigration and Nationality Act to be highly significant where Congress had provided such a limitation in former § 301(b) of the statute.¹⁷ The court below also ignored the differences between the broad language of § 4(f)(1), "to take any action otherwise prohibited," and the language of § 4(f)(2) and § 4(f)(3) exempting specific employment practices. As this Court recently emphasized in *Kosak v. United States*, 104 S.Ct. at 1524, the use of general language in a limitation, where other limitations in the statute are stated with greater specificity, demonstrates "[t]he absence of any analogous desire to limit the reach of the [general] statutory exception"

The "plain language of the Act buttressed by its legislative history" is dispositive of its meaning. *Tennessee Valley Authority v. Hill*, 437 U.S. at 187. See *Dickman v. Commissioner*, 104 S.Ct. at 1089. See also *Bell v. New Jersey and Pennsylvania*, — U.S. —, 103 S.Ct. 2187, 2197 (1983). As demonstrated above, the House Committee Report, the Senate Committee Report, the Conference Committee Report, and Congressional debates demonstrate that Congress intended to authorize mandatory "retirement" at an age which is BFOQ. Requiring a captain disqualified by the FAA Age 60 Rule to retire at age 60 is "to take any action otherwise prohibited under [§ 4(a) of the ADEA] . . . where age is a [BFOQ]" within the plain meaning of § 4(f)(1); to engage in "mandatory retirement or other employment practices where age is a [BFOQ] . . ." ¹⁸ is within the scope of the activities which Congress expressly identified as exempt in the course of amending the ADEA in 1978.

¹⁷ "The deliberate omission of a similar moderating provision in [this statute] compels the conclusion that Congress meant this 'continuous physical presence' requirement to be administered as written." *INS v. Phinpathya*, 104 S.Ct. at 589.

¹⁸ H.R. Rep. at 12.

Ultimately, the court below simply declined to believe that Congress really meant what it said, and substituted its own judgment concerning the appropriate scope of § 4(f)(1) for the decisions made by Congress in 1978 in authorizing the continued use of certain mandatory retirement practices. The decisions of this Court squarely reject this or any other form of "judicial legislation." See *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980) ("balancing of competing values and interests . . . in our democratic system is the business of elected representatives," not the courts); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 626 (1978) ("[W]e have no authority to substitute our views for those expressed by Congress in a duly enacted statute.") See also *Heckler v. Mathews*, — U.S. —, 104 S.Ct. 1387, 1396 (1984); *Tennessee Valley Authority v. Hill*, 437 U.S. at 194.

The Second Circuit not only ignored Congress' express intent that § 4(f)(1) should continue to authorize mandatory retirement at an age which is a BFOQ, but also read a limitation into § 4(f)(1) that Congress did not enact: making mandatory retirement of employees subject to a BFOQ unlawful when an employer accommodates other employees who are no longer able to work in a particular job. Yet, there is nothing in the language of § 4(f)(1) or, as demonstrated above, *supra* at pp. 9-13, in the legislative history of the ADEA to justify this distinction. In *American Tobacco Co. v. Patterson*, this Court rejected a proposed distinction between the "application" and "adoption" of seniority systems, since "[t]hat distinction would require reading § 703(h) [of Title VII] as though the reference to a seniority system were followed by the words 'adopted prior to the effective date of this section.' But the section contains no such limitations." 456 U.S. at 69. There is similarly no basis to read § 4(f)(1) as if it contained the limitation imposed by the court below on taking "any action" where age is a BFOQ.

Properly construed in accordance with its plain language, as buttressed by the legislative history of the ADEA, § 4(f)(1) authorizes the retirement of airline captains disqualified by the FAA Age 60 Rule at age 60.

CONCLUSION

For all the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit should be vacated and the judgment of the United States District Court for the Southern District of New York should be reinstated.

Respectfully submitted,

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May 31, 1984

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Nos. 83-997, 83-1325

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,
Petitioner,
v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK,
C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY
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INTERNATIONAL,
Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
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COMMISSION AND TRANS WORLD AIRLINES, INC.,
Respondents.

On Writs of Certiorari to the United States
Court of Appeals for the Second Circuit

**MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE AND BRIEF AMICUS CURIAE
OF THE CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA**

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**MOTION OF THE CHAMBER OF COMMERCE
OF THE UNITED STATES FOR LEAVE
TO FILE BRIEF AMICUS CURIAE**

The Chamber of Commerce of the United States moves for leave to file the attached brief *amicus curiae* in support of the petitioner, Trans World Airlines, Inc. We file this motion pursuant to Supreme Court Rule 36.3 because the individual respondents, Harold H. Thurston,

Christopher J. Clark and C. A. Parkhill declined to consent to the filing of the *amicus* brief.

The Chamber of Commerce of the United States ("Chamber") is the largest federation of business and professional organizations in the United States. Chamber membership currently exceeds 200,000, and includes over 195,000 corporations, partnerships and proprietorships as well as over 3,900 trade associations, and state and local chambers of commerce. The Chamber regularly represents the interests of its members in litigation of issues of national concern to the American business community, and, in fact, filed an *amicus curiae* brief in support of the Petition for Certiorari in case No. 83-997.¹

The issues in this case are of particular interest to Chamber members and to all American companies regulated by the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 (1982). Many of the Chamber's member companies employ workers within the class of employees protected by the ADEA. The Chamber, therefore, is concerned that employers who make non-age related accommodations for employees need not also be required to make age-related accommodations; that the standard of liability under the ADEA not be construed so broadly as to eliminate the requirement of specific intent to establish a "willful" violation of the ADEA; and that labor unions which violate the ADEA should be liable for monetary relief.

As the principal voice of the American business community, the Chamber is well-suited to present the broad interest of business in this case. The Chamber believes it is important for this Court to recognize the significance

¹ See, e.g., *Environmental Protection Agency v. Natural Resources Defense Council, Inc.*, cert. granted, 52 U.S.L.W. 3791 (U.S. May 1, 1984); *Bowen v. U.S. Postal Service*, — U.S. —, 74 L.Ed. 2d 402 (1983); *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

of these issues to business as a whole and, therefore, respectfully requests leave to file the attached brief.

Respectfully submitted,

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BRIEF AMICUS CURIAE
OF THE CHAMBER OF COMMERCE
OF THE UNITED STATES

STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") respectfully refers this Court to its Motion for Leave to File Brief Amicus Curiae for a statement of its interest in this proceeding.

INTRODUCTION

This case arises out of the Federal Aviation Administration's ("FAA") requirement that commercial airline pilots cease serving in that capacity after age 60.¹ 14 C.F.R. § 121.383. Prior to the 1978 amendments to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 (1982), Trans World Airlines, Inc. ("TWA"), like the rest of the airline industry, required all cockpit crewmembers to retire at age 60. This was consistent with the ADEA.²

Following passage of the 1978 amendments to the ADEA, TWA determined that changes would have to be made in order to comply with the statute. (J.A. 1046-47, 1050-51). Over the objections of the Air Line Pilots Association ("ALPA"), TWA instituted a new policy providing that any cockpit crewmember in flight engineer status at age 60 could not be compelled to retire. (J.A. 425). Transfers from pilot to flight engineer status were to be governed by the collective bargaining agreement (J.A. 425).

Soon thereafter, TWA was sued in separate actions both by ALPA and by a group of pilots. ALPA claimed that allowing anyone to work in the cockpit after age 60 violated the collective bargaining agreement and the Railway Labor Act, 45 U.S.C. 151 (1972) (J.A. 108-15).³ The plaintiffs in the instant case were pilots who had been retired at age 60 when there were no flight engineer vacancies available prior to their 60th birthdays. It was established that 83% of the pilots seeking to downgrade to flight engineer positions at age 60 have been successful in doing so. (A-61 n.8).

¹ It is not the Chamber's intention to provide a detailed restatement of the facts or the proceedings below. For such a recitation the Chamber respectfully refers the Court to petitioner, Trans World Airlines' Statement of the Case.

² See *United Airlines v. McMann*, 434 U.S. 192 (1977).

³ This suit was ultimately dismissed by the district court (A-50-54), and that ruling was affirmed on appeal. (A-13-21).

SUMMARY OF ARGUMENT

The U.S. Court of Appeals for the Second Circuit held in the instant case that TWA violated the ADEA by requiring pilots approaching age 60 to bid for positions as flight engineers, although a similar bidding requirement was not imposed on pilots becoming flight engineers because of health conditions. That holding ignores several key factors: Pilots downgrading because of health conditions were treated the same regardless of their age; only two pilots ever downgraded due to health considerations; and 83% of age 60 pilots were able to obtain positions as flight engineers through the seniority system's bidding procedures.

The duty of accommodation imposed by the Second Circuit is far in excess of any intended by Congress when it amended the ADEA in 1978. The statute and its legislative history are clear that employers are under no duty to provide special treatment to employees between ages 40 and 70.

Even if this Court finds that TWA violated the ADEA, it should reject the Second Circuit's conclusion that the violation was willful. The record is clear that TWA took the actions giving rise to this case in a good faith effort to comply with the 1978 amendments to the ADEA. The Second Circuit's conclusion appears to make any violation willful if it is not accidental or negligent. The Chamber believes this conclusion is inconsistent with both the plain meaning of the term "willful" and Congressional intent to establish two levels of liability under the Act. The Chamber urges this Court to adopt a specific intent standard of willfulness such as that adopted by the U.S. Court of Appeals for the First Circuit in *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1979), and the Seventh Circuit in *Syvock v. Milwaukee Boiler Manufacturing Co.*, 665 F.2d 149 (1981).

The Chamber additionally urges this Court to reject the Second Circuit's ruling that under the ADEA unions are exempt from monetary liability. The Second Circuit

originally imposed such liability, but then, without explanation, it amended its opinion to delete the imposition of monetary liability. Imposition of monetary liability on labor organizations is consistent with the ADEA itself, as well as its legislative history. Moreover, it is consistent with the practice under other labor statutes.

ARGUMENT

I. THE HOLDING OF THE MAJORITY BELOW IMPOSES BURDENS ON EMPLOYERS FAR BEYOND ANY INTENDED BY CONGRESS WHEN IT PASSED THE ADEA.

A majority of the court below reversed the district court's dismissal of the case and held that TWA had violated the ADEA by requiring that pilots approaching age 60 bid for positions as flight engineers prior to their 60th birthdays and retire if no position was available. The majority's holding is based on its view that TWA "routinely accommodates" pilots downgrading for non-age reasons. (A-30). In this regard, the majority noted that TWA captains who were unable to remain in that position due to a medical condition could downgrade to a flight engineer's position "without being required to bid for the position." (A-10).

What the majority mistakenly ignores, however, is that any of the plaintiffs, prior to turning age 60, could downgrade to a flight engineer's position in the same manner as a younger pilot if a medical condition had necessitated them doing so. As Judge Van Graafeiland notes in dissent, the majority's finding of discrimination based on a comparison of the procedures for downgrading because of the FAA age bar, and the procedure for downgrading because of an adverse medical condition, is "like comparing apples with oranges." (A-35 to A-36).⁴

⁴ In stating why he felt this was an unfair comparison, Judge Van Graafeiland noted:

"A pilot does not know in advance that he is going to break his leg or that company economics will eliminate the job he is

The Second Circuit's finding of discrimination based on the comparison of the different downgrading procedures is made all the more strange in view of the fact that no more than two pilots have reverted to flight engineer positions because of medical conditions (J.A. 968), and that 83% of pilots attempting to downgrade in order to continue working after age 60 have been successful in that regard. Rather than being based on a rational interpretation of the ADEA, the majority's conclusions appear to be based at least in part on its dislike of the FAA's age 60 rule. This is apparent from the majority's gratuitous observation that the FAA does not apply the age 60 rule to its own pilots. (A-18). The validity of the FAA requirement, however, is not disputed here. The simple fact is that TWA, like all major airlines, must comply with the rule, and TWA's actions here were taken in a good faith effort to comply with the rule, the 1978 amendments to the ADEA, and the working agreement.

The Chamber submits that TWA's accommodation was reasonable under the circumstances. The rationale of the Fifth Circuit in rejecting a claim of pregnancy discrimination under Title VII of the Civil Rights Act of 1964 is relevant here. As the Supreme Court cautioned in *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978), courts are "generally less competent than employers to restructure business practices."

In sum, the Chamber believes the Second Circuit has imposed a duty of accommodation far in excess of anything contemplated by Congress when it amended the ADEA. TWA has posited a valid, non-discriminatory business reason for the requirements imposed on pilots approaching age 60. The majority's order, in essence, requires TWA to create positions where none exists. The

performing. However, a pilot knows the exact date on which he will become 60 years of age and that after that date, FAA regulations will no longer permit him to work as a pilot." (A-36).

ADEA does not require such special treatment. As Judge Van Graafeiland, the dissenter here, stated for the majority in an earlier Second Circuit opinion:

The ADEA does not require an employer to accord special treatment to employees over forty years of age It requires, instead, that an employee's age be treated in a neutral fashion, neither facilitating nor hindering advancement, demotion, or discharge.

Parcinski v. Outlet Co., 673 F.2d 34, 37 (2d Cir. 1982), cert. denied, — U.S. —, 75 L.Ed. 2d 950 (1983). Accord, e.g., *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958, 960 (8th Cir. 1978) ("The act does not require that advanced age and substantial length of service entitle employees to special favorable consideration"); *Pirone v. Home Ins. Co.*, 559 F. Supp. 306, 311 (S.D.N.Y. 1983) ("The act does not require that employees 40 years of age or older be given a preference"); *Reilly v. Friedman's Express, Inc.*, 556 F. Supp. 618, 621 (M.D. Pa. 1983) (The ADEA "does not mandate special treatment be accorded those within the protected group").

II. THE DECISION BELOW FAILS TO DISTINGUISH WILLFUL FROM NON-WILLFUL CONDUCT AND ALLOWS FOR AUTOMATIC AWARDS OF DOUBLE DAMAGES.

A. The Decision Below Ignores The Plain Meaning Of "Willful" And Defeats Congressional Intent To Establish A Two-Tiered Level Of Liability Under The ADEA.

Section 7(b) of the ADEA authorizes the recovery of liquidated or double damages "only in cases of willful violations" of the Act. 29 U.S.C. § 626(b) (emphasis added). In the decision below, the Second Circuit broadly interprets the term "willful" and holds that in discriminatory treatment cases plaintiffs need not prove a specific intent to violate the ADEA. According to the Second

Circuit, "it is sufficient to establish that the employer either knew of or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." (A-33).

The Chamber is concerned that this broad standard for determining liability under the ADEA automatically makes "willful" all acts that are not accidental or negligent. Such a broad standard of "willfulness" is based on the faulty logic that "an employer's actions, if taken because of an impermissible factor such as age, cannot be the result of negligence, mistake, or other innocent reason." (A-34) (emphasis in the original). According to this logic, a finding of willfulness would necessarily follow in every ADEA disparate treatment case. The Chamber believes that this result is inconsistent with both the plain meaning of the term "willful" and Congress' intent to establish two levels of liability under the Act.

The plain meaning of § 7(b) denotes two levels of liability under the ADEA. Under this two-tiered approach, double damages are recoverable only when discrimination is willful. Actual damages are the appropriate remedy for non-willful discrimination. The fact that Congress provided for special remedies in the case of willful violations implies that employees can recover for accidental and unintentional violations as well as for deliberate violations of the ADEA. Yet, under the standard applied by the majority below, there can be no unintentional or innocent reason for an employer's action if taken because of age. By failing to distinguish willful from non-willful conduct, the Second Circuit ignores the plain meaning of the term "willful" and defeats congressional intent to establish a two-tiered level of liability under the ADEA.

It is undisputed that TWA revised its retirement policy vis-a-vis flight engineers in an effort to comply with, not to avoid, the 1978 amendments to the ADEA. These amendments raised the mandatory retirement age from

60 to 70. TWA changed its retirement policy in response to these amendments so that "any cockpit crew member who [was] in a Flight Engineer status at age 60 may not be compelled to retire." (A-9). Rather than violate the law, TWA was attempting to conform its retirement policy with changes in the law. But instead of being commended for its efforts, TWA was sued both by ALPA for allowing anyone to serve in the cockpit beyond age 60 and by several TWA captains who had to retire at age 60 because there were no flight engineer vacancies. Furthermore, the majority below found TWA to be in willful violation of the Act even though it was sued by one group for going too far and by another group for not going far enough in its attempt to comply with the ADEA. That holding is particularly absurd when viewed in the light of the fact that 83% of the retiring pilots were able to obtain positions as flight engineers.

The Chamber believes that the Second Circuit's approach to liquidated damages is wrong because it automatically makes "willful" all discriminatory actions that are based on age and thereby defeats Congress' intent to establish two levels of liability under the ADEA. The legislative history of § 7(b) of the ADEA supports a two-tiered approach to finding liability under the ADEA. Senator Javits, a co-sponsor of the original 1967 statute, characterized the civil liquidated damages provision of the ADEA as a punitive counterpart to the criminal sanctions provision of the Fair Labor Standards Act.⁵ A stricter view of the scienter standard for a willful violation therefore is consistent with legislative recognition of providing a more severe sanction for employers who willfully violate the ADEA.

⁵ "... [T]he [FLSA's] criminal penalty in cases of willful violations has been eliminated and a double damage liability substituted. This will furnish an effective deterrent to willful violations and at the same time avoid difficult problems of proof which would arise under a criminal provision." 113 Cong. Rec. 7076. (daily ed. March 16, 1967) (emphasis in the original).

B. A Specific Intent Standard Avoids Automatic Awards Of Double Damages And Is Consistent With Congressional Intent.

According to the standard for willfulness adopted by the majority below, an employer may be liable for double damages even though he did not know his actions were illegal. The Chamber believes that this standard is unfair and urges this Court to adopt a specific intent standard similar to the one established by the First Circuit in *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1979) and Seventh Circuit in *Syvock v. Milwaukee Boiler Manufacturing Co.*, 665 F.2d 149 (1981).

In *Loeb*, the First Circuit defined a violation of the ADEA as willful if "done voluntarily and intentionally and with the specific intent to do something the law forbids, that is to say, with bad purpose either to disobey or disregard the law." 600 F.2d at 1020 n.27, quoting *E. Devitt & C. Blackmar, Federal Jury Practice and Instructions* § 14.06, at 384 (3d ed. 1977). In *Syvock*, the Seventh Circuit held that "the standard of willfulness . . . should focus on the defendant's state of mind at the time the alleged discriminatory act occurred" and "that a finding of willfulness should lie only if there is some showing as to the defendant's knowledge of the legality of his actions." 665 F.2d at 155. Both Circuits therefore look at the purpose of an employer's actions to determine whether it was willful.

The majority below, on the other hand, adopts a much lower standard for determining willfulness. The Second Circuit test allows a recovery of double damages whenever an employee can prove that "an employer's action . . . [was] taken because of . . . age . . ." (A-34). This test allows for automatic awards of double damages and, consequently, is inconsistent with congressional intent to establish two levels of liability under the ADEA.

A specific intent standard for determining willfulness would eliminate automatic awards of double damages and be consistent with congressional intent. While Congress did not intend that liquidated damages be awarded for every violation of the ADEA, by providing for such damages Congress did not intend that they never be awarded. By requiring proof of the defendant's state of mind to establish a "willful" violation of the ADEA, this Court would strike an appropriate balance between these two countervailing concerns and ensure that an award of liquidated damages is an exceptional, rather than an automatic, remedy. The Chamber therefore urges this Court to adopt the strict, specific intent standard for "willful" violations of the ADEA, rather than the Second Circuit's standard which makes awards of double damages automatic in a disparate treatment case.

III. LABOR ORGANIZATIONS THAT VIOLATE THE ADEA SHOULD BE LIABLE FOR MONETARY RELIEF.

Assuming this Court finds that TWA and ALPA violated the ADEA, the Chamber believes there is strong support for the proposition that ALPA should share in the monetary liability. In fact, in its initial opinion, the Second Circuit held that the plaintiffs in this action could recover back pay from the union as well as from the employer. In this regard, the court originally held:

[Plaintiffs] are entitled to recover back pay, an equitable remedy, against the union. *Equal Employment Opportunity Commission v. Air Line Pilots Association, Int'l.*, 489 F. Supp. 1003, 1008-10 (D. Minn. 1980) *rev'd. on other grounds*, 661 F.2d 90 (8th Cir. 1981). The union owes a duty to all its members, including its over-60 members, not to discriminate against them. See, *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944). One of the purposes of a back pay award is to spur unions, as well as employers, to evaluate employment practices

and eliminate unlawful discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975).

(A-34-35).

Although petitions for rehearing were denied, the Second Circuit subsequently deleted those portions of its opinion where it imposed monetary liability on the union. (A-38-39). The Second Circuit provided absolutely no rationale for its action.

There is no question that the Second Circuit viewed the union as culpable. In this regard, the majority below specifically held that the union sought "to use the ADEA to cut off the right of the older flight engineers." (A-20). The court also said that the union "actively campaigned to persuade TWA to retain its age-60 retirement policy for all flight deck positions, opposed TWA's unilateral action to attempt partial compliance with the ADEA and induced TWA to impose further discriminatory restrictions on captains seeking to downbid to flight engineer status . . ." (A-32-33).

The Second Circuit's unexplained waiver of union liability for monetary relief contradicts the plain language of the statute. Section 4(c) of the ADEA, 29 U.S.C. § 623, makes it illegal for a union to take any action which adversely affects an employee because of his or her age. And the remedial provision of the statute, section 7(b), 29 U.S.C. § 626(b), provides in relevant part that "court[s] shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of the Act"

That Congress intended unions to be responsible for their actions is further buttressed by the legislative history of the 1978 amendments to the ADEA. For example, during consideration of the 1978 amendments, Congressman Findley stated:

The AFL-CIO wants union leadership to keep mandatory retirement as an issue for negotiation during

collective bargaining. Union leaders argue that because they represent a majority of the workers, mandatory retirement would therefore be a majority decision. But a majority should never be permitted to impose injustice on even a small minority. Unions cannot bargain away the rights of blacks or women—why older citizens?

123 Cong. Rec. H 9348 (daily ed. Sept. 13, 1977).

And, Congressman Hillis expressed agreement with an article he inserted in the hearing record from the newsletter of the American Association of Retired Persons which states in pertinent part:

Myth: Unions should have the right to use a mandatory retirement age as a "bargaining chip" in collective bargaining with management.

Reality: Unions are prohibited from discrimination on the basis of race, religion or sex and collective bargaining. Why should they be allowed to practice age discrimination by bargaining away a person's opportunity to earn a livelihood merely because of age? In recent months several unions—including the United Steelworkers of America—have made important strides toward flexible retirement policies for their members. We hope that their colleagues in organized labor will see the wisdom of this approach.

123 Cong. Rec. H 9970 (daily ed. Sept. 23, 1977).

It is incomprehensible that Congress would express this type of concern over union compliance with the ADEA, but not intend union liability for losses caused by its noncompliance. See *EEOC v. ALPA*, 489 F.Supp. at 1009.⁶ As recently as last term, this Court recognized that if unions are not made to share in the monetary liability resulting from their illegal acts, they will have little motivation to comply with their statutory respon-

⁶ *Contra Neuman v. Northwest Airlines*, 28 FEP Cases 1488 (N.D. Ill. 1982).

sibilities. *Bowen v. U.S. Postal Service*, — U.S. —, 74 L. Ed. 2d at 416 (1983). In *Bowen*, a fair representation case, this Court stated: "In the absence of damages apportionment where the default of both parties contributed to the employee's injury, incentives to comply with the grievance procedure will be diminished."⁷

Back pay awards against unions have also been consistently imposed under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 141 (1972). For example, unions which violate § 8(b)(2) of the NLRA by causing an employer to discriminate against employees by encouraging or discouraging union membership have been held by the National Labor Relations Board to be entirely liable for the back pay when it was necessary to do so in order to make the injured employees whole. 29 U.S.C. § 158(b)(2). In *Radio Officers' Union v. NLRB*, 347 U.S. 17, 54-55 (1953), this Court emphatically rejected the argument that it would not effectuate NLRA policies to require the union "to reimburse back pay if the employer is not made to share this burden. . . ."

Imposition of monetary liability on the unions under the ADEA is also consistent with the practice under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1981). Courts uniformly have held under Title VII that unions must share monetary liability with employers.⁸ The same result should obtain under the ADEA.

⁷ *Bowen* was a refinement of this Court's holding in *Vaca v. Sipes*, 386 U.S. 171, 197 (1967), that the "governing principle . . . is to apportion liability between the employer and the union according to the damage caused by the fault of each."

⁸ See, e.g., *Sears v. Atkinson, Topeka, and Santa Fe Railway*, 645 F.2d 1365, 1374-77 (10th Cir. 1981), cert. denied 456 U.S. 964 (1982); *Donnell v. General Motors Corp.*, 567 F.2d 1292, 1300 (8th Cir. 1978); *Allen v. Amalgamated Transit Union, Local 788*, 554 F.2d 876, 881 (8th Cir.), cert. denied, 434 U.S. 891 (1977); *Rogers v. International Paper Co.*, 526 F.2d 722, 723 (8th Cir. 1975). See also, Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702, 706 (1980).

For these reasons, the Chamber believes that imposition of monetary liability is consistent with the ADEA, other labor statutes, and our national labor policy. Moreover, there is no inequity in imposing monetary liability on a party found to be directly responsible for a statutory violation where (1) the statute expressly imposes a duty to comply, and (2) the statute provides that the court may "grant such legal or equitable relief as may be appropriate to effectuate the purposes of the Act . . ." 29 U.S.C. § 626(b).

CONCLUSION

For the foregoing reasons, the Chamber of Commerce respectfully urges this Court to find that TWA did not violate the ADEA. If this Court should find TWA in violation of the ADEA, the Chamber respectfully urges that it find that the violation was not willful, and that the union must share in the monetary liability arising from the violation.

Respectfully submitted,

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Nos. 83-997, 83-1325

Office Supreme Court, U.S.

100-100-10

JUL 6 1984

ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,

v.

Petitioner,

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A.
PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COM-
MISSION AND AIR LINE PILOTS ASSOCIATION, INTERNA-
TIONAL,

Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

v.

Petitioner,

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A.
PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COM-
MISSION AND TRANS WORLD AIRLINES, INC.,

Respondents.

On Writs of Certiorari to the United States
Court of Appeals for the Second Circuit

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INTERNATIONAL

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QUESTIONS PRESENTED

1. Whether a defendant-employer may assert the EEOC's claim for damages under the Age Discrimination in Employment Act ("ADEA") against a defendant-union, notwithstanding that the EEOC has not sought review of the judgment that the defendant-union is not liable for damages, has opposed the defendant-employer's assertion of the EEOC's damages claim, and has stated that it will seek complete recovery of damages from the defendant-employer?

2. Whether a joint violator of the ADEA has a right to shift a portion of the damages which may be obtained against it to a codefendant union (*i.e.*, secure contribution) where the EEOC no longer seeks damages against the union; if so, whether the Court should consider that claim where it was asserted for the first time by petition for certiorari?

3. Whether, in the absence of a damages remedy against labor unions in the comprehensive remedial scheme of the Fair Labor Standards Act ("FLSA") as incorporated in the ADEA, the EEOC may secure monetary relief against a defendant-union for jointly violating the ADEA with an employer?

4. Whether the EEOC may secure liquidated damages against a union for violating the ADEA?

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-997, 83-1325

TRANS WORLD AIRLINES, INC.,

v. *Petitioner,*

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

v. *Petitioner,*

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND TRANS WORLD AIRLINES, INC.,

Respondents.

On Writs of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF OF AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL
Respondent in No. 83-997

PRELIMINARY STATEMENT

Air Line Pilots Association, International ("ALPA"), petitioner in No. 83-1325 and respondent in No. 83-997, respectfully submits this brief on the merits as respondent in No. 83-997.

STATUTES INVOLVED

Pertinent provisions of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, and of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e-2000e-17, are set forth in the Supplemental Appendix, annexed hereto.

STATEMENT OF THE CASE

ALPA filed a brief in these consolidated cases as petitioner in No. 83-1325. The Statement of the Case in that brief describes TWA's employment of flight deck crew members and the procedural history of this case (ALPA Br. as Petitioner at 4-7), and will be repeated or enlarged only as relevant to the present brief.

A. TWA's Retirement Practices

For approximately twenty years, TWA retired all flight deck crew members (captains, first officers, international relief officers and flight engineers) at age 60. The 1978 amendments to the ADEA, effective April 6, 1978, eliminated a bona fide employee benefit plan defense to mandatory retirement at age 60. Pub. L. No. 95-256, § 2(a), 92 Stat. 189 (1978).

In August, 1978, TWA unilaterally decided to permit flight engineers to continue in their jobs past age 60, but to retain its policy of retiring captains and first officers when they reached age 60, J.A. 425, because they were subject to the FAA Age 60 Rule, 14 C.F.R. § 121.383(c), which is a bona fide occupational qualification ("BFOQ") under § 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1). TWA Br. at 28 n.35. TWA determined that it could allow flight engineers to serve past age 60 because, in its view, they were not subject to a BFOQ, and § 4.2 of the collectively bargained pilot retirement plan provided that any crew member could serve past the normal retirement date (age 60) with "written approval of the company." J.A. 243, 410.

In implementing its August, 1978 policy, TWA routinely permitted captains who successfully bid for flight engineer positions in order to serve past age 60 to postpone training past the effective date of the bid, so that they could work as captains until age 60. J.A. 59. All other crew members were scheduled for training so as to be qualified for a new position as close as possible to the effective date of their bids. *Id.* In early 1980 TWA modified its practice to require captains who downbid in order to serve past age 60 to fulfill their bids in the same timely manner as other crew members.¹

On July 25, 1979, ALPA and TWA signed a collective bargaining agreement ("Agreement"), effective August 1,

¹ At a meeting in January, 1980, ALPA representatives suggested that the practice of treating captains approaching age 60 more favorably than other pilots was contrary to the collective bargaining agreement. At some time after that meeting, TWA began to require downbidding captains to enter training on the same basis as other crew members. J.A. 1069. As a result of this change, captains who successfully bid for flight engineer positions were scheduled to begin training one to four months prior to age 60. J.A. 765-6. The deposition of Joseph C. Hilly, TWA Vice-President, Labor Relations, which is the only evidence in the record concerning TWA's decision to require downbidding captains to fulfill their bids in a timely manner, indicates that Mr. Hilly could not recall whether or not this change in TWA's practices was a result of the meeting with ALPA: "It just so happened that our reading of the agreement coincided on that possibility." J.A. 1071.

While the Court of Appeals concluded that "the evidence is undisputed that ALPA caused TWA to institute the requirement that successful downbidders 'fulfill their bids in a timely manner,' resulting in the cancellation of bids awarded three downbidding EEOC plaintiffs . . .," A-32, only two plaintiffs reached age 60 after January 1980 (H.W. Lewis, 11/24/80; D.V. Roquemore, 8/21/81). TWA Br. at 13 n.16. Moreover, plaintiffs never claimed that the "timely manner" policy resulted in the cancellation of bids, but rather asserted that this change caused *successfully* downbidding captains to lose "pay and responsibility, in contrast to the 1979 situation when virtually all downbidders were permitted to complete their full careers as captains." Appellants' Br. at 18, Court of Appeals, Nos. 82-6266, 6280, 6306.

1979, which superseded the prior agreement in effect July 20, 1977 to July 31, 1979. J.A. 147, 337-38. Section 4.2 of the retirement plan was retained in the 1979 Agreement. A-32. Neither party had proposed any modification of § 4.2 in the 1979 negotiations. J.A. 158.

B. Decision of the Court Below

The Court of Appeals held that "ALPA is liable under 29 U.S.C. § 623(c) (3) to the *EEOC* plaintiffs who were damaged by its conduct." A-33 (emphasis added). In a footnote, the court explicated the basis for its decision: "ALPA's actions in signing the post-1978 Working Agreements and in causing TWA to implement other restrictions on the downbidding older captains and flight engineers render it liable under § 623(c) (3). . . ." A-33 n.19. The court's reference to "other restrictions" was to the requirement that downbidding captains "fulfill their bids in a timely manner." A-32.²

With respect to the subject *EEOC* plaintiffs, the Court of Appeals held that "the remedial scheme of the ADEA,

² As the effective date of the "post-1978 Working Agreement" was August 1, 1979, and the requirement to "fulfill . . . bids in a timely manner" was not implemented until after January, 1980, the court's holding that ALPA is liable "to the *EEOC* plaintiffs who were damaged by its conduct" refers to the three *EEOC* plaintiffs who reached age 60 on or after August 1, 1979. (The retirement dates of the three individual and seven *EEOC* plaintiffs are set forth in TWA's Br. at 13 n.16. All three individual plaintiffs, and four *EEOC* plaintiffs, reached age 60 and were terminated in accordance with TWA's unilateral August, 1978 policy on or before November 10, 1978).

While the court below also noted that "ALPA actively campaigned to persuade TWA to retain its age-60 retirement policy for all flight deck crew positions, [and] opposed TWA's unilateral action in August 1978 to attempt partial compliance with the ADEA," it did not find that these *unsuccessful* attempts caused injury to plaintiffs, nor could it have so found by summary judgment where the record contained statements by TWA management that ALPA played no role in the formulation of the August, 1978 policy. J.A. 1005A, 1050-52.

which incorporates that of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219; *Lorillard v. Pons*, 434 U.S. 575 (1978), does not permit actions to recover monetary damages, including backpay, against a labor organization." A-38.

C. Position of the Parties before this Court

TWA seeks to present the question of a union's monetary liability for a violation of the ADEA in the event that this Court affirms the judgment of the court below that TWA and ALPA jointly violated the ADEA as to certain *EEOC* claimants. Prior to its petition for certiorari, TWA had not asserted that ALPA should bear any part of the monetary liability which might result from the application of its August, 1978 policy: TWA did not file a cross-claim against ALPA, or otherwise allege in its answers that ALPA was responsible for any injuries caused by its policies, J.A. 74, 91, 99, nor did TWA raise this issue in opposing plaintiffs' request for summary judgment on appeal.

While individual plaintiffs originally sought to obtain "backpay and any other pecuniary loss or amounts owing them by defendants," plus liquidated damages, J.A. 68, and the *EEOC* sought to require "[d]efendants TWA and ALPA to pay appropriate back wages, and an equal sum as liquidated damages. . . ," J.A. 97, all plaintiffs elected *not* to file conditional cross-petitions to seek review of that aspect of the Court of Appeals judgment that the ADEA does not permit recovery of "monetary damages, including backpay, against a labor organization."³ Rather, plaintiffs made the tactical decision to forgo review by this Court and instead seek recovery of damages only

³ Individual plaintiffs also declined to appeal from the judgment holding ALPA liable only to "EEOC plaintiffs." TWA does not contest this aspect of the judgment. Accordingly, the only issue posed by TWA relates to potential damages to certain *EEOC* claimants.

from TWA. EEOC Br. in Opp. to TWA Pet. for Cert. in No. 83-997, at 19 n.16; Thurston Br. in Opp. to TWA Pet. for Cert. in No. 83-997, at 10.

SUMMARY OF ARGUMENT

Unless this Court reverses the summary judgment finding ADEA violations, TWA will be subject to "total monetary liability." TWA Br. at 44. Not wishing to be "stuck" with this liability, *id.*, TWA asks the Court to rule that ALPA should also pay damages—even though the EEOC, representing members of the class for whose benefit the ADEA was enacted, has decided not to seek damages from ALPA and is bound by an unappealed judgment limiting the EEOC claimants to damages from the employer.

TWA plainly may not assert the EEOC's rights; even if it could, it would still be seeking only an advisory opinion, since the EEOC is bound by the judgment below. Nor should the Court consider whether TWA has a right to have ALPA pay damages, since that issue was neither presented to nor considered or decided by the courts below.

TWA is in no different a position than any other joint violator "stuck" for all of the damages, who asserts that it is unfair that plaintiff has recovered, or will recover, full relief from him alone. This type of claim by a joint violator, whatever the stage of litigation at which it is made, merely asserts a right of contribution. The Court in *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981), held that neither Title VII nor the Equal Pay Act, 29 U.S.C. § 206(d) ("EPA"), authorized an employer to "compel the union to share the responsibility for a joint violation of a third party's rights." 451 U.S. at 93. Since the remedial provisions of the ADEA, like those of the EPA, are adopted from the FLSA, and the ADEA's substantive prohibitions are

drawn from Title VII, TWA plainly has no right to contribution under the ADEA.

Finally, as the FLSA provides no damages remedy against labor organizations, and the ADEA does not modify those provisions of the FLSA, the court below correctly ruled that the EEOC has no right to obtain damages from ALPA. The EEOC cannot in any event secure liquidated damages under the ADEA. The judgment limiting the EEOC to securing monetary relief against TWA should be affirmed.

ARGUMENT

I. TWA HAS NO RIGHT TO ASSERT THE EEOC'S CLAIM FOR DAMAGES OR OTHERWISE COMPEL ALPA TO SHARE ITS FINANCIAL RESPONSIBILITY.

Two distinct issues are encompassed in the question presented by TWA: 1) whether the EEOC may secure damages from ALPA; and 2) whether TWA may compel ALPA to share its financial responsibility, where the EEOC has decided to seek its damages from the employer alone. These issues are wholly separate: if, as an abstract proposition, the EEOC may secure a money award from unions under the ADEA, that does not determine whether TWA as a joint violator could compel ALPA to pay. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 88-89 & n.20, 92 n.25 (1981). TWA may not assert plaintiffs' claims. TWA's claim was not presented below and has no basis in the ADEA. The Court should not disturb a judgment denying union liability for money damages to EEOC claimants which has not been appealed by the EEOC.

A. The EEOC's Claim for Damages against ALPA Is Not Properly before the Court.

Insofar as TWA seeks to hold ALPA responsible for injuries to EEOC claimants, only the EEOC may assert

their claim for damages.⁴ The EEOC agrees: "[T]he proper parties to seek further review of this issue would be [plaintiffs], the ones who were injured by ALPA's discriminatory conduct." EEOC Br. in Opp. to TWA Pet. for Cert. at 19. Since plaintiffs have not done so, TWA's "claim should be rejected." *Id.*

TWA seeks an advisory opinion beyond the power of the Court. In the event that TWA may be unable to answer to the total judgment against it, the Court of Appeals judgment denies the EEOC any recourse against ALPA. As the EEOC filed no cross-petition to reverse this adverse aspect of the judgment, it is bound by the judgment, and may not, as a respondent, seek to enlarge its rights on appeal.⁵ A decision here that unions may be subject to damages under the ADEA could have no subsequent effect in this proceeding; lacking effect, it would be advisory.⁶

⁴ See, e.g., *Capital Cities Cable, Inc. v. Crisp*, — U.S. —, 52 U.S.L.W. 4803, 4805 n.6 (U.S. June 19, 1984); *Beebe v. Highland Tank and Manufacturing Co.*, 373 F.2d 886, 890 (3d Cir.), cert. denied, 388 U.S. 911 (1967); *Webb v. Beverly Hills Federal Savings & Loan Association*, 364 F.2d 146, 149 (9th Cir. 1966); *Norton v. Lindsay*, 350 F.2d 46, 48 (10th Cir. 1965); *Hamilton Trust Co. v. Cornucopia Mines Co.*, 223 F. 494 (9th Cir. 1915). As the court stated in *Hamilton Trust Co.*, "the right or title which appellant seeks to establish must be his own and not that of a third person." 223 F. at 499.

⁵ See, e.g., *United States v. Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512, 516 (1973); *Swarb v. Lennox*, 405 U.S. 191, 201 (1972); *Le Tulle v. Scofield*, 308 U.S. 415, 421-22 (1940); *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191-92 (1937); *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924); *The Maria Martin*, 79 U.S. (12 Wall.) 31, 40, 41 (1870).

⁶ See, e.g., *Linda R. S. v. Richard D.*, 410 U.S. 614 (1973) (decision regarding enforcement of criminal support law would be purely advisory since imprisonment of delinquent father would not affect petitioner's rights); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976) (absent showing that

B. TWA Has No Right to Compel ALPA to Share Responsibility for Damages under the ADEA.

TWA complains that it should not be "stuck with total monetary liability," TWA Br. at 44, although the EEOC has decided that it is better served by seeking its monetary remedies from the employer alone. TWA's claim is simply another formulation of a request for contribution from a joint violator. TWA asserts that right for the first time here, and has, in any event, no statutory right to shift damages.

1. TWA's belated effort to shift damages to ALPA should not be considered.

The issue of TWA's right to shift damages was not raised, considered or decided in the courts below. TWA did not assert a cross-claim against ALPA in its answers nor otherwise plead that any injury alleged by plaintiffs was a result of conduct by ALPA. J.A. 74, 91, 99. When it opposed plaintiffs' request for summary judgment in the Court of Appeals, TWA did not claim that any portion of the damages should be recovered from ALPA rather than TWA. TWA Br. as Appellee, No. 82-6266. The issue is raised here for the first time in the entire course of this litigation.⁷

This Court "will not ordinarily consider" issues "neither raised before nor considered by the Court of Appeals." *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 147

the injury may be redressed by a favorable decision, decision by a federal court would be "gratuitous and thus inconsistent with Art. III limitations.")

⁷ TWA has consistently taken the position that the pilot collective bargaining agreement did not require retirement at age 60. A-14. TWA argues that it required captains to retire at age 60 because they were subject to the FAA Age 60 Rule, a BFOQ under § 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1). TWA Br. at 28 n.35. As petitioner in No. 83-1325, ALPA argues that TWA's decision was authorized by § 4(f)(1) of the ADEA.

n.2 (1970).⁸ It is only in "exceptional circumstances" that the Court departs from this rule. See *Capital Cities Cable, Inc. v. Crisp*, — U.S. —, 52 U.S.L.W. 4803, 4805 (U.S. June 19, 1984); *Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958). TWA has argued that it was not necessary to file a cross-claim, or, in the alternative, that a cross-claim could be asserted under Fed. R. Civ. P. 15, "even after judgment." TWA Reply Br. in Support of Pet. for Cert. at 5 n.**. If the discretionary rule of this Court not to consider issues neither raised nor decided in the courts below could be circumvented by the possibility of a subsequent amendment of the pleadings, it would cease to exist.⁹ TWA has not explained why it waited until after judgment to assert a cross-claim, or, indeed, offered any reason why its claim against ALPA should be initially considered by this Court.

2. TWA has no right to shift damages.

TWA's effort to shift damages should in any event be rejected. This Court has held that an employer has neither a federal statutory nor common law right under either the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d), or Title VII "to compel [a] union to share responsibility for a joint violation of a third party's rights." *Northwest Airlines*, 451 U.S. at 93. The Court in *Northwest Airlines* ruled that neither the language of the referenced statutes, nor their structure and legislative histories, supported an implied damages remedy by employers against unions, and that it would be improper for federal courts to add such a remedy to comprehensive legislative schemes

⁸ See also *United States v. Santana*, 427 U.S. 38, 41 n.2 (1976); *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957).

⁹ In *Foman v. Davis*, 371 U.S. 178 (1962), on which TWA relies, TWA Reply Br. in Support of Pet. for Cert. at 5 n.**, the issue concerning post-judgment amendment of the pleadings had been raised in and decided by the Court of Appeals. 371 U.S. at 182.

which included integrated remedial and enforcement procedures. Although *Northwest Airlines* was a separate lawsuit for contribution by an employer held liable for monetary relief under Title VII and the EPA,¹⁰ it applies with equal force to the present case where TWA seeks, by writ of certiorari, to shift damages under the ADEA.

In *Northwest Airlines*, the Court assumed that all the elements of a contribution claim had been established and that the policies of the EPA and Title VII supported a right to contribution. 451 U.S. at 88-90.¹¹ Nonetheless, no right to shift damages could be implied from the statutes since employers are not "members of the class for whose especial benefit either the Equal Pay Act or Title VII was enacted." 451 U.S. at 92. Moreover, the "comprehensive character of the [applicable] remedial scheme expressly fashioned by Congress," and the silence of each statute's legislative history, strongly argued against a Congressional intent to create additional remedies. 451 U.S. at 93.

¹⁰ See *Laffey v. Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C. 1973), *aff'd in part, vacated in part*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

¹¹ Those elements being: (1) that the union was "at least partially responsible" for the proven statutory violations; and (2) that the plaintiffs "could have asserted a claim for monetary relief against their unions" under the EPA and Title VII. *Northwest Airlines*, 451 U.S. at 88-89 & n.20.

Since this Court assumed that the unions in *Northwest Airlines* were also responsible for the proven EPA and Title VII violations, the Court of Appeals' finding here that ALPA was partially responsible for the alleged ADEA violations is not a basis to distinguish *Northwest Airlines*. For the same reason, TWA's policy arguments—the same noted in *Northwest Airlines*—are equally unavailing. Compare TWA Br. at 39-41 with *Northwest Airlines*, 451 U.S. at 89 n.21.

In *Lorillard v. Pons*, 434 U.S. 575 (1978), the Court described the ADEA as a "hybrid" statute, incorporating, with a few express modifications, the procedures, remedies and enforcement mechanisms of the FLSA, 434 U.S. at 578-79, and the substantive prohibitions of Title VII, *id.* at 584. The EPA was enacted as an amendment to the FLSA, and, like the ADEA, adopts the remedial, procedural and enforcement mechanisms of the FLSA. 29 U.S.C. § 206(d)(3). Whether one looks to the remedial scheme of the ADEA, adopted from the FLSA, or its substantive provisions, modeled after Title VII's prohibitions, *Northwest Airlines* makes clear that a defendant has no right to compel a joint violator to pay damages under the ADEA.

Employers are no more members of the class for whose "especial benefit" the ADEA was enacted than they are beneficiaries of Title VII or the EPA. The legislative history of the ADEA is no less mute regarding the creation of employer remedies against codefendant unions than that of Title VII or the EPA.¹² There is thus no indication that Congress, in enacting the ADEA, intended to permit employers to shift their liability for damages to union codefendants. In view of the ADEA's comprehensive remedial scheme, it is no more appropriate for federal courts to create a new remedy for employer-defendants under ADEA than it is to do so under Title VII or the EPA. See *Northwest Airlines*, 451 U.S. at 97.

TWA argues that § 7(b) of ADEA, 29 U.S.C. § 626 (b), which provides that a court "shall have jurisdiction to grant such legal or equitable relief as may be appro-

¹² The legislative history cited by TWA, Br. at 41, indicates only that ADEA's substantive prohibitions apply to unions as well as employers, which the statute expressly provides in 29 U.S.C. § 623(c) and (d). As both Title VII, 42 U.S.C. § 2000e-2(c), and the EPA, 29 U.S.C. § 206(d)(2), also prohibit union violations, this legislative history is irrelevant to the question whether employers may shift any of their monetary liability to unions.

priate to effectuate the purposes of this Act," permits a court to assess damages against a union as well as an employer. TWA Br. at 39-40. This language in § 7(b) does not provide any greater right to an employer to shift damages to the union than did analogous language in § 706(g) of Title VII¹³ at issue in *Northwest Airlines*.¹⁴ The power of a court to grant remedies under § 7(b) of the ADEA effectuates the statutory rights of plaintiffs; the ADEA does not impose any duty on a plaintiff to sue all potential defendants, nor does it authorize any one defendant to litigate plaintiff's claim for damages against a codefendant who successfully defeats that claim at any stage of the proceeding.

Whatever power a court may have to award monetary relief under the ADEA against all of the defendants from whom plaintiffs seek damages, there is no power,

¹³ Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), authorizes the court under Title VII to order "such affirmative action as may be appropriate . . . or any other equitable relief as the court deems appropriate."

¹⁴ In *Northwest Airlines*, the Court referred to the "broad power under § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), to fashion relief against all respondents named in a properly filed charge." 451 U.S. at 93 n.28. The Court's statement could only have referred to respondents who had been charged and whom plaintiffs had sued for damages; a mere respondent to a charge is not a defendant to a damages claim unless named and served in a court action. See 42 U.S.C. § 2000e-5(f)(1) (charging party may bring "civil action" against respondent). Cf. *Baldwin County Welcome Center v. Brown*, — U.S. —, 104 S.Ct. 1723 (1984) (Title VII action must be commenced by filing a timely complaint; plaintiff cannot rely on EEOC charge or filing notice of right to sue in federal court). The District Court in *Laffey* could not have found the union responsible for damages even if it had been a respondent to a charge, because plaintiffs chose not to sue the union, which was made a party to that litigation only to enable the court to implement complete injunctive relief. See *Northwest Airlines*, 451 U.S. at 81 n.5. Plaintiffs here have abandoned their claim for damages against ALPA, so that ALPA is now in precisely the same position in this case as the unions in *Laffey* and *Northwest Airlines*.

where the plaintiffs have abandoned their claim for damages against a defendant, to hold that defendant liable at the instance of another, unless the latter has a right of contribution. The procedural context in which a right to contribution is asserted cannot add to the substantive statutory rights which Congress has created. If there is no right to contribution in an independent action for contribution against a union, that right cannot be created by use of a third-party complaint, cross-claim, or, as in the instant case, by petition for writ of certiorari.¹⁵

Where liability is joint and several, it is settled that no defendant may compel a plaintiff to seek or enforce a monetary judgment from another potential or actual defendant.¹⁶ Any violator is wholly liable without respect to the liability of others. Judgment against him is enforceable in full, whether or not plaintiff could secure or enforce a judgment against other persons. Since an appeal has no effect on the judgment against him, the ad-

¹⁵ *Separate action: Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981); *Anderson v. Local 3, International Brotherhood of Electrical Workers*, 582 F. Supp. 627 (S.D.N.Y. 1984), appeal docketed, No. 84-7384 (2d Cir. 1984).

Third Party Complaint: Germann v. Pekow, 531 F. Supp. 355 (N.D. Ill. 1981).

Joinder of indispensable party: Liberles v. County of Cook, 709 F.2d 1122 (7th Cir. 1983); *Marshall v. Eastern Airlines, Inc.*, 474 F. Supp. 364 (S.D. Fla. 1979), *aff'd on other grounds sub nom. EEOC v. Eastern Airlines, Inc.*, 26 Empl. Prac. Dec. (CCH) ¶ 32,122 (5th Cir.), *cert. denied*, 454 U.S. 818 (1981); *Atkinson v. Owens-Illinois Glass Co.*, 10 Fair Empl. Prac. Cases (BNA) 710 (N.D. Ga. 1975).

¹⁶ *See, e.g., Lugar v. Edmondson Oil Co.*, 639 F.2d 1058, 1065 n.14 (4th Cir. 1981), *aff'd in part, rev'd in part on other grounds*, 457 U.S. 922 (1982); *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1257 (7th Cir. 1980); *Wylain, Inc. v. Kidde Consumer Durable Corp.*, 74 F.R.D. 434, 437 (D. Del. 1977). *See also* 3A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 19.11, at 19-233 to 234; (2d ed. 1984); RESTATEMENT (SECOND) OF TORTS §§ 875, 885(1), (2) (1977).

judicated joint violator simply has no appealable interest in the dismissal of other defendants, and *may not appeal* a judgment in favor of a codefendant.¹⁷

In this case TWA and ALPA were found liable for a joint violation of the ADEA. TWA Br. at 16, 38. Plaintiffs agree that defendants' liability under the FLSA, and hence, the ADEA, is joint and several. *See* EEOC Br. in Opp. to TWA's Pet. for Cert. at 19 & n.16 and cases cited therein; Thurston Br. in Opp. to TWA's Pet. for Cert. at 10 and n.14. The joint and several liability of joint violators of the FLSA was well established before the enactment of the ADEA in 1967,¹⁸ and is no less

¹⁷ *See, e.g., Beebe v. Highland Tank and Manufacturing Co.*, 373 F.2d 886, 890 (3d Cir. 1967), *cert. denied*, 388 U.S. 911 (1967); *Webb v. Beverly Hills Federal Savings & Loan Association*, 364 F.2d 146, 149 (9th Cir. 1966); *Albert Miller & Co. v. Wilkins*, 209 F. 582, 585 (7th Cir. 1913); W. PROSSER, THE LAW OF TORTS, § 47, at 296-97 (4th ed. 1971). *Cf. Corsicana National Bank v. Johnson*, 251 U.S. 68, 89 (1919); *Contino v. Baltimore & Annapolis Railroad*, 178 F.2d 521 (9th Cir. 1949); RESTATEMENT (SECOND) OF TORTS, §§ 883, 885(1), (2); 3 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 14.11, at 14-64 to 67 (2d ed. 1984) and cases cited therein.

¹⁸ *See, e.g., Wood v. Meier*, 218 F.2d 419, 420 (5th Cir. 1955); *Greenberg v. Arsenal Bldg. Corp.*, 50 F. Supp. 700, 704 (S.D.N.Y. 1943), *modified on other grounds and otherwise aff'd*, 144 F.2d 292 (2d Cir. 1944), *aff'd in relevant part sub nom. Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697 (1945); *Mitchell v. Stewart Brothers Construction Co.*, 184 F. Supp. 886, 890 (D. Neb. 1960); *Goldberg v. Dix Box Co.*, 45 Lab. Cas. (CCH) ¶ 31,325, at 41,428 (S.D. Cal. 1962).

This principle continues to govern FLSA enforcement. *See, e.g., Donovan v. Agnew*, 712 F.2d 1508, 1511 (1st Cir. 1983); *Donovan v. Sabine Irrigation Co.*, 695 F.2d 190, 194-95 (5th Cir.), *cert. denied*, — U.S. —, 103 S.Ct. 3537 (1983); *Donovan v. Maxim Industries, Inc.*, 552 F. Supp. 1024, 1025 (D. Mass. 1982); *Altman v. Stevens Fashion Fabrics*, 441 F. Supp. 1318, 1321 (N.D. Cal. 1977); *Brennan v. Whatley*, 432 F. Supp. 465, 469 (E.D. Tex. 1977); *Marshall v. Keasling*, 82 Lab. Cas. (CCH) ¶ 33,562, at 47,936 (E.D. Mich. 1977); *Usery v. Godwin Hardware, Inc.*, 426 F. Supp. 1243, 1266 (W.D. Mich. 1976); *Wirtz v. Soft Drinks of Shreveport*,

incorporated in the ADEA than the right to a jury trial in a private action. See *Lorillard*, 434 U.S. at 581 (in enacting the ADEA, Congress is presumed to have been aware of the judicial interpretation given to the incorporated sections of the FLSA).¹⁹ As a joint violator of the statute, TWA has no right to appeal dismissal of a codefendant. Whether or not the EEOC could secure damages from ALPA, TWA remains fully liable, and has no appealable interest in the ruling below that ALPA is not liable for monetary relief. Accordingly, TWA's petition concerning union liability must be denied.

II. THE ADEA DOES NOT AUTHORIZE MONETARY RELIEF AGAINST LABOR ORGANIZATIONS.

A. Congress Fully Incorporated into ADEA the Remedial Scheme of the FLSA with Respect to the Recovery of Lost Wages and Benefits.

Section 4 of the ADEA expressly prohibits certain conduct by employers and labor organizations. These obligations are "enforced through express incorporation of the remedial rights and procedures of the [FLSA], rather than through independent ADEA remedies." *Kelly v. American Standard, Inc.*, 640 F.2d 974, 977-78 (9th Cir. 1981). Section 7(b) of the ADEA, 29 U.S.C. § 626(b), states that a prohibited act under § 4 of the ADEA "shall be deemed to be a prohibited act under Section 15" of the FLSA, 29 U.S.C. § 215, and further provides that "[t]he provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in"

Inc., 336 F. Supp. 950, 958 (W.D. La. 1971). But see *EEOC v. Air Line Pilots Association, International*, 489 F. Supp. 1003 (D. Minn. 1980), *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981).

¹⁹ The ADEA incorporates the remedial scheme of the FLSA, *Lorillard*, 434 U.S. at 583-85, and nothing in § 7(b) of the ADEA suggests that Congress intended in the ADEA to modify the FLSA rule of joint and several liability for a joint violation. *Id.* at 581-82.

sections 11(b), 16 (except § 16(a)) and 17 of the FLSA, and § 7(c) of the ADEA.²⁰ 29 U.S.C. § 626(b) (emphasis added).

In *Lorillard*, this Court determined that Congress intended to incorporate the "remedies and procedures of the FLSA" into the ADEA "to the greatest extent possible. . . ." 434 U.S. at 582, *quoting* 113 Cong. Rec. 31,254 (1967) (remarks of Sen. Javits, a floor manager of the bill). Indeed, the EEOC bases its position that defendants are jointly and severally liable for a joint ADEA violation on FLSA and Equal Pay Act cases. EEOC Brief in Opposition to TWA's Petition for Certiorari at 19 n.16. TWA also argues that the ADEA must be enforced in accordance with the FLSA as it stood when the ADEA was enacted. TWA Br. at 37 n.49. The lower federal courts have decided a broad range of remedial and procedural issues concerning the enforcement of the ADEA by reference to FLSA remedies and procedures.

²⁰ Section 7(c) of the ADEA has been construed "to give individuals the ability to take advantage of the relief conferred in § 626(b)," but is not "an independent source of remedies under the statute." *Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684, 685 n.1 (7th Cir.), *cert. denied*, 459 U.S. 1039 (1982). See generally *Lorillard v. Pons*, 434 U.S. at 581-82, 583 n.11; *Burns v. Equitable Life Assurance Society*, 696 F.2d 21, 23 (2d Cir. 1982), *cert. denied*, — U.S. —, 104 S.Ct. 336 (1983).

²¹ Class action procedures:

See, e.g., *La Chappelle v. Owens-Illinois, Inc.*, 513 F.2d 286 (5th Cir. 1975).

Award of prejudgment interest:

Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1102 (8th Cir. 1982); *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1114 (4th Cir. 1981); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 982 (9th Cir. 1981).

Punitive Damages and Damages for Pain and Suffering:

See, e.g., *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 147-48 (2d Cir. 1984); *Fiedler v. Indianhead Truck Line*,

Thus, "[i]n order to determine whether a union may be held liable to one of its members for his lost wages under the ADEA, it is necessary to determine whether a union would have such liability under the FLSA." *Neuman v. Northwest Airlines, Inc.*, 28 Fair Empl. Prac. Cases (BNA) 1488, 1490 (N.D. Ill. 1982). TWA concedes that unions are not subject to monetary remedies under the remedial scheme of the FLSA, but argues that "the selectivity in the FLSA should not be applied woodenly" under the ADEA in light of the "legal relief" authorized in § 7(b) of the ADEA, 29 U.S.C. § 626(b). TWA Br. at 40. However, as shown *infra*, at pp. 30-34, the language of § 7(b), as construed by this Court and the lower federal courts, does not provide an additional monetary remedy for labor organization violations of § 4 of the ADEA which was not provided in §§ 16 and 17 of the FLSA for labor organization violations of § 15 of the FLSA.

Inc., 670 F.2d 806, 810 (8th Cir. 1982); *Pfeiffer v. Essex Wire Corp.*, 682 F.2d at 686; *Naton v. Bank of California*, 649 F.2d 691, 699 (9th Cir. 1981); *Slatin v. Stanford Research Institute*, 590 F.2d 1292 (4th Cir. 1979); *Vazquez v. Eastern Airlines, Inc.*, 579 F.2d 107 (1st Cir. 1978); *Dean v. American Security Insurance Co.*, 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978).

EEOC Right to Jury Trial:

See *EEOC v. Corry Jamestown Corp.*, 719 F.2d 1219, 1223 (3d Cir. 1983). Accord *EEOC v. Brown & Root, Inc.*, 725 F.2d 348 (5th Cir. 1984).

Attorney's Fees:

Vocca v. Playboy Hotel of Chicago, Inc., 686 F.2d 605 (7th Cir. 1982).

Termination of individual right of action following suit by the EEOC:

Burns v. Equitable Life Assurance Society, 696 F.2d 21.

Extraterritorial Application of the ADEA:

Cleary v. United States Lines, Inc., 728 F.2d 607, 610 (3d Cir. 1984).

B. The FLSA Does Not Provide for Recovery of Damages Caused by Union Violations of § 15 of the FLSA.

The relevant substantive prohibitions of the FLSA may be briefly summarized. Sections 6(a), (b), (c), (e) and (f), 29 U.S.C. § 206(a), (b), (c), (e) and (f), require employers to pay their employees a minimum wage. Section 6(d) (the EPA) prohibits an employer from paying differing wages on the basis of sex, and prohibits labor organizations from causing or attempting to cause employers to discriminate on that basis.²² Section 7, 29 U.S.C. § 207, regulates employer overtime compensation practices. Section 15(a)(2) makes it unlawful "for any person" to violate §§ 6 or 7, and § 15(a)(3) makes it unlawful "for any person" to retaliate against an employee for action relating to enforcement of the statute. 29 U.S.C. § 215(a)(2), (3). Thus, the FLSA governs the minimum wage and overtime practices of employers and the equal pay and retaliation practices of employers and labor organizations.

Four enforcement mechanisms are established. First, there are criminal sanctions under § 16(a) against "any person who willfully violates" any provision of § 15. 29 U.S.C. § 216(a). Second, an "employee" may bring an action under § 16(b) against "any employer" who violates §§ 6, 7, or 15(a)(3) (retaliation). 29 U.S.C. § 216(b). Third, the Secretary of Labor may bring an action under § 16(c) to recover amounts owing for violations of §§ 6 and 7. 29 U.S.C. § 216(c). Fourth, the "Administrator" may proceed under § 17 to restrain violations of § 15, including "the restraint of any withholding of payment of minimum wages or overtime compensa-

²² Section 6(d)(2), 29 U.S.C. § 206(d)(2), provides that "[n]o labor organization . . . shall cause or attempt to cause such an employer to discriminate against an employee in violation of" the equal pay provisions in § 6(d)(1) of the FLSA, 29 U.S.C. § 206(d)(1).

tion" due as a result of violations of § 15(a)(2). 29 U.S.C. §§ 211(a), 217.

Under this remedial scheme, an "employer" which violates § 6 or § 7 of the FLSA is subject to criminal sanctions under § 16(a), employee actions under § 16(b), Secretary of Labor actions under § 16(c), and injunction proceedings by the Administrator under § 17. While a labor organization is included in the definition of "person," FLSA § 3a, 29 U.S.C. § 203(a), the term "employer" expressly excludes a "labor organization (other than when acting as an employer)," FLSA § 3(d), 29 U.S.C. § 203(d). Remedies against labor organizations are therefore limited to criminal penalties under § 16(a) for willful violation of § 15, and § 17 actions to enjoin violations of § 15. There is no right of action under § 16(b) or § 16(c) against a labor organization "other than when acting as an employer;" there is no basis to seek recovery of "unpaid minimum wages and overtime compensation" under § 17 from a union co-signatory to a collective bargaining agreement which violates § 15(a)(2) of the FLSA.

1. The EEOC has no right of action against ALPA under § 16(c).

Whether the EEOC may recover damages against ALPA under § 16(c) of the FLSA²³ turns on two questions of statutory construction: 1) whether the ADEA incorporates § 16(c) as it existed in 1967 or as subsequently amended in 1974; and 2) in any event, whether § 16(c) authorizes recovery of damages against labor organizations.

²³ Section 16(b) actions may only be brought by an "employee." Only "[t]wo of the incorporated [FLSA] sections, FLSA §§ 16(c) and 17, apply to actions brought by the Secretary of Labor on behalf of aggrieved individuals" to enforce the ADEA. *EEOS v. Gilbarco, Inc.*, 615 F.2d 985, 988 (4th Cir. 1980).

a. FLSA § 16(c) must be construed as incorporated in the ADEA in 1967.

ADEA was enacted in 1967. Pub. L. No. 90-202, 81 Stat. 602 (1967). At that time § 16(c) of the FLSA authorized the Secretary of Labor to bring an action, on behalf of an employee who had made a written request to the Secretary, to recover unpaid minimum wages and overtime compensation, but not liquidated damages. 29 U.S.C. § 216(c) (1964 ed.), *amended by* Pub. L. No. 93-259, § 26, 88 Stat. 55, 77 (1974). Section 16(c) further deprived the courts of jurisdiction in any action by the Secretary "involving an issue of law which has not been settled finally by the courts." *Id.* In 1974 Congress amended § 16(c) to delete the requirement of a written request and the limitation as to issues "settled finally by the courts", and authorized the Secretary to secure liquidated damages in § 16(c) actions. Pub. L. No. 93-259, § 26, 88 Stat. 55, 73 (1974).

In the 1967 enactment of the ADEA, Congress incorporated the remedial scheme of the then existing FLSA, except for certain express modifications in § 7(b) of the ADEA.²⁴ See *Lorillard*, 434 U.S. at 582. The incorporation of a statute in a subsequent enactment "has always been considered as referring to the law existing at the time of adoption, and no subsequent legislation has ever been supposed to affect it; and such must necessarily be

²⁴ As enacted, § 7(b) states, in material part: "The provisions of this Act shall be enforced in accordance with . . . sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended. . . ." Pub. L. No. 90-202, § 7(b), 81 Stat. 602, 604 (1967). As codified, the references are to "sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title. . . ." 29 U.S.C. § 626(b). There is no express reference to the effect of subsequent amendments. Cf. *Pearce v. Director, Office of Workers' Compensation Programs*, 603 F.2d 763, 767 (9th Cir. 1979) (Defense Base Act, as originally enacted, incorporated the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, "as amended, and as the same may be amended hereafter . . .").

the effect and operation of such adoption.' " *In re Heath*, 144 U.S. 92, 94 (1892), quoting *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 625 (1838). Accord *Hassett v. Welch*, 303 U.S. 303, 314 (1938).²⁵

As TWA states, Congress has not expressed an intent to incorporate the post-1967 amendments to § 16(c) into the ADEA. TWA Br. at 37 n.49. Thus the EEOC could have no right of action under § 16(c) against ALPA, since the issues presented to this Court concerning the lawfulness under §§ 4(a) and 4(f) (1) of the ADEA of a retirement policy such as TWA's were not settled finally by the courts when the EEOC intervened in this action.²⁶ Moreover, the EEOC cannot recover liquidated damages against ALPA since § 16(c) did not authorize such damages in an action by the Secretary until the 1974 amendment. Section 16(c), as incorporated in the ADEA, provides no right of action for damages against ALPA.

b. *Section 16(c) does not otherwise authorize recovery of damages against labor organizations.*

Even if Congress intended the 1974 amendment of the FLSA to be incorporated into the ADEA, § 16(c) still does not authorize recovery of damages against ALPA.

²⁵ The Court in *EEOC v. Chrysler Corp.*, 546 F. Supp. 54, 73-78 (E.D. Mich.), *aff'd on other grounds*, 683 F.2d 146 (6th Cir. 1982), held that the 1974 amendments to § 16(c) were incorporated in the ADEA, based on its characterization of specific references to § 16 and § 17 of the FLSA as manifesting an intent "to incorporate the general FLSA enforcement scheme." Yet, the FLSA enforcement scheme is contained not only in § 16 and § 17 of the FLSA, but also in the Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251-262. In *Lorillard*, the Court noted that "the ADEA expressly incorporates §§ 6 and 11 of the Portal-to-Portal Act, [but] ADEA does not make any reference to § 11, 29 U.S.C. § 260" (which creates a "good faith" exception to the liquidated damages authorized in § 16(b) and § 16(c) of the FLSA). See, e.g., *Goodman v. Heublein, Inc.*, 645 F.2d 127, 129-30 (2d Cir. 1981) and cases cited therein (holding that the ADEA does not incorporate 29 U.S.C. § 260).

²⁶ See, e.g., *Wirtz v. Marino*, 405 F.2d 938 (1st Cir. 1968).

Section 16(c) does not create any right of recovery on behalf of an employee beyond the recovery he could obtain in his own action under § 16(b).

[A]n employee who is not paid minimum wages or overtime . . . may choose between action by the Administrator under [§ 16(c)] for simply the amount which is owed to him and his own individual right of action under [§ 16(b)] for both back wages and liquidated damages together with a reasonable attorney's fee.

S. Rep. No. 640, 81st Cong., 1st Sess., reprinted in 1949 U.S. CODE CONG. & AD. NEWS 2241, 2249. "A suit under § 16(c), therefore, is essentially a representative action brought to enforce the private rights described in § 16(b)." *EEOC v. Corry Jamestown Corp.*, 719 F.2d 1219, 1221 (3d Cir. 1983). See also *Wirtz v. Jones*, 340 F.2d 901, 904 (5th Cir. 1965) ("[u]nder § 16(b) the employees may sue the employer for backpay, and under § 16(c) the Secretary . . . may bring the action").

Section 16(b) does not authorize an action against a labor organization. Although a union may violate § 15(a)(2) of the FLSA, by causing an employer to pay gender-discriminatory wages, § 16(b) only authorizes recovery of "unpaid minimum wages and overtime compensation" against an "employer." Under § 3(d) of the FLSA, the term "employer" "does not include any labor organization (other than when acting as an employer). . . ." Where a statute is unambiguous, the plain meaning of the statutory language governs. See, e.g., *INS v. Phinpathya*, — U.S. —, 104 S.Ct. 584, 589 (1984).

Thus, shortly after the enactment of the FLSA, the court in *Bowe v. Judson C. Burns, Inc.*, 137 F.2d 37 (3d Cir. 1943), held that § 16(a) of the FLSA (criminal sanctions) is applicable to a labor organization which

violates § 15(a)(3) (retaliation) because the latter provision is directed against "any person" (defined to include labor organizations, § 3(a), 29 U.S.C. § 203(a)). However, emphasizing that the FLSA is "carefully drawn and every term is used as a term of art," 137 F.2d at 38, the court noted that "[e]mployee actions may be maintained only under Section 16(b) to recover back wages and liquidated damages," *id.* at 39, and that § 16(b) "provides that an 'employer' who violates the wage and hour sections of the Act . . . shall be liable to the employee affected for unpaid wages and for damages." *Id.*

Every court to address the question has held that an employee injured by labor organization violations of § 15(a)(2) of the FLSA may not recover damages against labor organizations under § 16(b), based on the express terms of § 3(d) and § 16(b).²⁷ Prior to *Northwest Airlines*, 451 U.S. 77, the lower federal courts also rejected employers' claims for contribution from unions alleged to have jointly violated the EPA on the ground that § 16(b) of the FLSA does not authorize recovery of damages from unions.²⁸

Whether or not the amendments to the FLSA subsequent to 1967 are deemed incorporated into the ADEA, they further demonstrate that Congress has at all times intended that damages under § 16 only be recovered from

²⁷ *Lyon v. Temple University*, 507 F. Supp. 471, 474-75 (E.D. Pa. 1981); *Cook v. Mountain States Telephone and Telegraph Co.*, 397 F. Supp. 1219, 1226 (D. Ariz. 1975); *Hunter v. United Air Lines, Inc.*, 10 Fair Empl. Prac. Cases (BNA) 787, 788 (N.D. Cal. 1975); *Tuma v. American Can Co.*, 367 F. Supp. 1178, 1181 (D.N.J. 1973).

²⁸ *Denicola v. G.C. Murphy Co.*, 562 F.2d 889, 894 (3d Cir. 1977); *Wust v. Northwest Airlines, Inc.*, 86 Lab. Cas. (CCH) ¶ 33,811, at 48,805 (W.D. Wash. 1979). *Cf. Northwest Airlines, Inc. v. Transport Workers Union*, 606 F.2d 1350, 1355 (D.C. Cir. 1979), *aff'd in part and vacated in part*, 451 U.S. 77 (1981).

an "employer" and not a union.²⁹ Until 1974, § 16(b) provided that "[a]n action to recover such liability [referring to liability of an "employer" who violates §§ 6 or 7] may be maintained in any court of competent jurisdiction. . . ." *See, e.g.*, 29 U.S.C. § 16(b) (1970). In the 1974 amendments, Pub. L. No. 93-259, 88 Stat. 55 (1974), Congress modified that sentence to read that the action "may be maintained against any employer (including a public agency). . . ." ³⁰ Congress did not provide any § 16(b) remedy against labor organizations which caused private employers or public agencies to violate the statute. *See Hunter v. United Air Lines, Inc.*, 10 Fair Empl. Prac. Cases (BNA) 787, 788 (N.D. Cal. 1975).

Until 1977, there was no private right of action under § 16(b) for retaliation in violation of § 15(a)(3). *See, e.g.*, 29 U.S.C. § 216(b) (1976). In the 1977 FLSA amendments, Pub. L. No. 95-151, 91 Stat. 1245 (1977), Congress modified § 16(b) to provide a private action for retaliation.³¹ Congress limited the new § 16(b) legal and equitable remedies to a private right of action against "any employer" which unlawfully retaliates against employees, *id.*, although previous case law had

²⁹ *See generally Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969); *United States v. Stewart*, 311 U.S. 60, 64 (1940).

³⁰ The amended sentence of § 16(b) states: "[a]ctions to recover such liability may be maintained [against any employer (including a public agency)] in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves, and other employees similarly situated." (1974 additions in brackets). Pub. L. No. 93-259, § 6(d)(1), 88 Stat. 55, 61-62 (1974).

³¹ The 1977 amendment to § 16(b) provides: "Any employer who violates the provisions of section 15(a)(3) of this Act shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3), including without limitation employment, reinstatement, promotion and the payment of wages lost, and an additional equal amount as liquidated damages." Pub. L. No. 95-151 § 10, 91 Stat. 1245, 1252 (1977).

denied any private right of action for damages under § 16(b) or for injunctive relief under § 17 against either an employer or a labor organization which violated § 15 (a) (3) of the FLSA,³² and recent decisions had construed "employer" not to apply to labor organizations.³³ This omission confirms that the absence of a right of action against unions under § 16(b) or § 16(c) was not inadvertent. See generally *Lehman v. Nakshian*, 453 U.S. 156, 162 (1981) (no right to a jury trial under § 15 of the ADEA, 29 U.S.C. § 633a [federal employment]; § 7(c) (2) of the ADEA "expressly provides for jury trials," "[b]ut in § 15 [Congress] failed explicitly to do so.").

2. Section 17 does not provide a remedy to recover money damages against unions which enter into collective bargaining agreements embodying unlawful employment practices.

Section 17 of the FLSA, 29 U.S.C. § 217, allows the Secretary to secure injunctions to restrain violations of § 15, 29 U.S.C. § 215. Section 17 was amended in 1961 to authorize "the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act. . . ." Pub. L. No. 87-30, § 12(b), 75 Stat. 65, 82 (1961). The language, legislative history, judicial construction and administrative enforcement of § 17 do not "disclose a purpose to make the union jointly liable in damages, but rather to give the Secretary of Labor power to enjoin violations of the [FLSA] where a union is responsible, as

³² See, e.g., *Martinez v. Behring's Bearings Service, Inc.*, 501 F.2d 104 (5th Cir. 1974); *Powell v. Washington Post Co.*, 267 F.2d 651 (D.C. Cir.), cert. denied, 360 U.S. 930 (1959); *Bonner v. Elizabeth Arden, Inc.*, 177 F.2d 703 (2d Cir. 1949); *Bowe v. Judson C. Burns, Inc.*, 137 F.2d at 38-39; *Britton v. Grace Line Inc.*, 214 F. Supp. 295 (S.D.N.Y. 1962).

³³ *Cook*, 397 F. Supp. 1219, *Hunter*, 10 Fair Empl. Prac. Cases (BNA) 787, and *Tuma*, 367 F. Supp. 1178, were decided between 1973 and 1975; *Denicola*, 562 F.2d 889, was decided in 1977. See *supra* at p. 24 nn.27, 28.

well as power to enjoin employers from future violations and require payment for past ones." *Wirtz v. Hayes Industries, Inc.*, 1 Empl. Prac. Dec. (CCH) ¶ 9874, at 1090 (N.D. Ohio 1968).

Because "employers," and not unions, can be liable to employees under the FLSA for unpaid minimum wages or overtime compensation, it follows that only "employers" are capable of wrongfully withholding such funds from employees. Therefore, only "employers" may be restrained from engaging in such withholding.

Neuman v. Northwest Air Lines, Inc., 28 Fair Empl. Prac. Cases (BNA) at 1490-91.

The legislative history of the 1961 amendments to § 17 demonstrates that Congress had two purposes for this enactment:

First, the restraint was meant to increase the effectiveness of the enforcement of the Act by depriving a violator of any gains accruing to him through his violation. Second, the amendment was meant to protect those employers who comply with the Act from having to compete unfavorably with employers who do not comply. (Senate Report No. 145, 87th Cong., First Session, 1961; 1962 U.S. CODE CONG. & ADMIN. NEWS 1620 at 1658-1659).

Wirtz v. Malthor, Inc., 391 F.2d 1, 3 (9th Cir. 1968).³⁴ Both of these Congressional purposes seek to redress the competitive advantage gained by an employer by engaging in violations of the Act. Neither presents a rationale for holding unions liable for back wages wrongfully withheld. Indeed, permitting the employer to shift any part of its liability to the union "would subvert the congress-

³⁴ *Accord Donovan v. Sovereign Security, Ltd.*, 726 F.2d 55 (2d Cir. 1984); *Donovan v. Brown Equipment and Service Tools, Inc.*, 666 F.2d 148, 156-57 (5th Cir. 1982); *Hodgson v. American Can Co.*, 440 F.2d 916 (8th Cir. 1971); *Marshall v. A & M Consolidated Independent School District*, 605 F.2d 186, 189 (5th Cir. 1979).

sional policies sought to be advanced." *Brennan v. Emerald Renovators, Inc.*, 410 F.2d 1057, 1061 (S.D.N.Y. 1975). *Accord EEOC v. Ferris State College*, 493 F. Supp. 707, 716 (W.D. Mich. 1980). Moreover, to construe § 17 to authorize recovery against unions for discriminatory policies embodied in collective bargaining agreements would create different economic risks for unionized and non-unionized employers who violate § 15 of the FLSA, as employees of unionized employers could proceed against the union for damages.³⁵

The lower federal courts have routinely rejected contribution claims in § 17 actions by employer-defendants against unions which signed collective bargaining agreements that violate the equal pay provisions of the FLSA, because such claims are inconsistent with the language and purposes of § 17.³⁶ With a single exception, neither the Secretary of Labor nor the EEOC have brought § 17 actions against labor organizations to recover damages under the EPA or FLSA.³⁷ The principle that the Secre-

³⁵ Cf. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 710 (1945) (holding that employee waiver of liquidated damages claims were inconsistent with statutory goals of eliminating economic incentives for statutory violations: "An employer is not to be allowed to gain a competitive advantage by reason of the fact that his employees are more willing to waive claims for liquidated damages than are those of his competitors.").

³⁶ *EEOC v. Ferris State College*, 493 F. Supp. 707, 716-17 (W.D. Mich. 1980); *Marshall v. Tombs Janitorial Service, Inc.*, 82 Lab. Cas. (CCH) ¶ 33,559 (W.D. Mo. 1977); *Usery v. Beloit College*, 12 Empl. Prac. Dec. (CCH) ¶ 11,203 (W.D. Wis. 1976); *Dunlop v. Beloit College*, 411 F. Supp. 398 (W.D. Wis. 1976); *Brennan v. Emerald Renovators, Inc.*, 410 F. Supp. 1057 (S.D.N.Y. 1975); *Wirtz v. Hayes Industries, Inc.*, 1 Empl. Prac. Dec. (CCH) ¶ 9874 (N.D. Ohio 1968). Cf. *Murphy v. Miller Brewing Co.*, 307 F. Supp. 829 (E.D. Wis. 1969), *aff'd sub nom. Hodgson v. Miller Brewing Co.*, 457 F.2d 221 (7th Cir. 1972) (union agreement to labor contract containing sex-discriminatory provisions does not state a claim for violation of 29 U.S.C. § 206(d)(2)).

³⁷ The only reported case in which the Secretary sought to obtain a monetary remedy from a labor organization invoked the general

tary of Labor may obtain an injunction under § 17 against "any person" who violates the Act, but may only recover "unpaid wages and overtime compensation" from an "employer", has also been recognized outside the context of actions against labor organizations. In *Wirtz v. Pure Ice Co.*, 322 F.2d 259 (8th Cir. 1963), the court affirmed both the entry of an injunction against an owner of a corporation for violations of the FLSA, and the denial of a judgment for unpaid wages against him, based on a finding that the owner was not an "employer" within the meaning of § 3(d) of the FLSA, 29 U.S.C. § 203(d).

In any event, if § 17 were construed to authorize recovery of "unpaid minimum wages and overtime compensation" from both parties to a collective bargaining agreement, liquidated damages are not available in a § 17 ac-

equitable powers of the court, rather than a construction of the scope of § 17. In *Hodgson v. Sagner, Inc.*, 326 F. Supp. 371, 374 (D. Md. 1971), *aff'd sub nom. Hodgson v. Baltimore Regional Joint Board*, 462 F.2d 180 (4th Cir. 1972), the court awarded the Secretary of Labor monetary relief against a union based solely on its outrageous conduct in insisting that an employer divert to its male employees part of the back pay which it had agreed to provide to female victims of discrimination.

In *Northwest Airlines*, 451 U.S. 77, the EEOC argued that its remedies for union violations of the EPA are injunctive relief and "in flagrant cases . . . a Commission suit for damages." EEOC Br. in *Northwest Airlines* at 18, citing *Hodgson v. Sagner, Inc.* The EEOC characterized *Sagner* as a case in which "the employer had disgorged the funds unlawfully withheld and was no longer at a competitive advantage, and the fund was misallocated at the union's insistence." *Id.*

Subsequent decisions have consistently declined to read *Sagner* to establish joint liability under § 17 on the part of labor organizations for recovery of unpaid minimum wages and overtime compensation resulting from unlawful collective bargaining agreements. *Northwest Airlines*, 606 F.2d at 1356; *Denicola v. G.C. Murphy Co.*, 562 F.2d at 894; *EEOC v. Ferris State College*, 493 F. Supp. at 716-17; *Brennan v. Emerald Renovators, Inc.*, 410 F. Supp. at 1062; *Dunlop v. Beloit College*, 411 F. Supp. at 402.

tion for enforcement of the FLSA or the ADEA. S. Rep. No. 145, 87th Cong., 1st Sess. (1961), *reprinted in* 1962 U.S. CODE CONG. & AD. NEWS 1620, 1659. See *EEOC v. Gilbarco, Inc.*, 615 F.2d 985, 988, 991 (4th Cir. 1980) (ADEA); *Donovan v. Brown Equipment and Service Tools, Inc.*, 666 F.2d 148, 156 (5th Cir. 1982) (FLSA). Cf. *Wilkes v. United States Postal Service*, 548 F. Supp. 642 (N.D. Ill. 1982) (no liquidated damages in federal employee action pursuant to § 15 of the ADEA, 29 U.S.C. § 633a).

C. Section 7(b) of the ADEA Does Not Provide Monetary Remedies in Addition to those Expressly Authorized by the FLSA.

The "selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA." *Lorillard*, 434 U.S. at 582.³⁸ Accord *EEOC v. Gilbarco, Inc.*, 615 F.2d at 987-88 n.1. The creation of a damages remedy against unions is not one of the express modifications to the FLSA remedies enacted in the ADEA.³⁹

³⁸ The Court noted in *Lorillard* that Congress made three changes in incorporating FLSA remedies into § 7(b) of the ADEA. First, Congress provided equitable relief to employees which was only available in an action by the Secretary under § 17 of the FLSA. 434 U.S. at 581. Second, liquidated damages were restricted to cases of willful violations of the ADEA, in contrast to the automatic award of liquidated damages in a § 16(b) action under the FLSA, which is subject only to the "good faith" defense provided in § 11 of the Portal-to-Portal Act of 1947, 29 U.S.C. § 260. *Id.* at 581 & n.8. Third, the criminal sanctions in § 16(a) of the FLSA, applicable to "any person" who violated § 15 of the act, were deleted from the ADEA. *Id.* at 582.

³⁹ When Congress has intended to modify the scope of the remedies available against a party in an incorporated statute, it has expressly manifested its intent to do so. For example, in Section 7(a) of the 1978 amendments to Title IV of the Federal Coal Mine

TWA appears to suggest that the general "legal or equitable relief" language in § 7(b)⁴⁰ should be read to imply a remedy for recovery of money damages against unions. TWA Br. at 39-40. Yet, § 7(b) expressly defines the monetary remedies for injuries caused by ADEA violations in terms of the remedies provided in § 16 and § 17 of the FLSA: "[a]mounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title" 29 U.S.C. § 626(b) (emphasis added).

In *Lorillard*, the Court read the reference to "legal relief" to refer specifically "to judgments 'enforcing . . . liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation,'" 434 U.S. at 583 n.11, quoting 29 U.S.C. § 626(b). As TWA admits, "[t]he reference . . . to 'unpaid minimum wages or unpaid overtime compensation' relates to language in the FLSA which has been specifically incorporated into Section 7(b)

Health and Safety Act of 1969, 30 U.S.C. §§ 801-962 (The Black Lung Benefits Reform Act of 1977) ["Reform Act"], Pub. L. No. 95-239, 92 Stat. 95 (1978) (codified at 30 U.S.C. §§ 901-945), Congress incorporated the remedial scheme of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950, but expressly modified the references to "employer" in the LHWCA to refer to the trustees of the black lung benefits fund. By this substitution of the trustees for the employer, Congress made available an attorney's fees remedy against the fund in black lung benefit claim cases that had not been expressly authorized in LHWCA claim cases. Compare *Director, Office of Workers' Compensation Programs v. Black Diamond Coal Mining Co.*, 598 F.2d 945, 948-49 (5th Cir. 1979) with *Director, Office of Workers' Compensation Programs v. Robertson*, 625 F.2d 873, 877 n.6 (9th Cir. 1980).

⁴⁰ "[A] court 'shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including . . . enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.'" TWA Br. at 39-40, quoting 29 U.S.C. § 626(b) (emphasis and deletions in original).

of the ADEA." TWA Br. at 40. The Court in *Lorillard* further read § 7(b) as a direction by Congress "that actions for lost wages under the ADEA be treated as actions for unpaid minimum wages or overtime compensation under the FLSA." 434 U.S. at 582. The Court concluded that the reference to "equitable" jurisdiction in § 7(b) was intended to provide equitable remedies in private ADEA actions which were not available in FLSA suits by private individuals, 434 U.S. at 581, rather than as an additional source of "legal relief".⁴¹

Lower federal court decisions have similarly construed "legal relief" in § 7(b) in terms of the "definition of amounts owing as unpaid minimum wages or unpaid overtime compensation" in § 7(b) and "the reference to sections 216 and 217 of [this] chapter. . . ." *Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684, 686 (7th Cir.), cert. denied, 459 U.S. 1039 (1982). Thus, in *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143 (2d Cir. 1984), the court declined to read the reference to "legal relief" as "expansive remedial authority," but rather held the provisions deeming "'amounts owing as a result of a violation [of the ADEA] . . . to be unpaid . . . wages'" "to be dispositive of the drafter's intention" not to provide monetary remedies in § 7(b) in addition to those provided in the FLSA.

⁴¹ The "equitable" relief available under § 7(b) of the ADEA does not create a right to recover backpay. In *Lorillard*, this Court concluded that Congress manifested an intent to provide a right to a jury trial by creating a "legal" remedy for lost wages under § 16(b) of the FLSA (which had been construed to provide a right to a jury trial) rather than an equitable "backpay" remedy analogous to Title VII or § 17 of the FLSA (which had been construed not to provide a right to a jury trial in actions to recover lost wages). *Lorillard*, 434 U.S. at 580 n.7. Indeed, the court in *Morelock v. NCR Corp.*, 546 F.2d 682, 688 (6th Cir. 1976), vacated and remanded, 435 U.S. 911 (1978), had erroneously concluded that a jury trial was not permitted in a private ADEA action, based on its determination that the ADEA created an equitable backpay remedy rather than a legal remedy.

[T]he more expansive grant of judicial authority ["such legal or equitable relief"] permits courts in their discretion to supplement back pay awards with injunctive relief, orders of reinstatement or promotion, or similar non-monetary remedies designed to "effectuate the purposes of [the ADEA]"; 29 U.S.C. § 626(b).

731 F.2d at 147.⁴²

In any event, even if § 7(b) could be read to provide broader remedies enforcing liability for unpaid minimum and overtime compensation than are available under the FLSA, there is no indication of an intent to expand the parties liable for such relief. The grant of jurisdiction to confer "legal or equitable" relief does not support this construction of § 7(b). TWA's argument in reliance on this general language simply goes too far, as it would authorize the courts to grant relief without regard to what is expressly provided in §§ 16 or 17 of the FLSA. This reading of the grant of jurisdiction in the fourth sentence in § 7(b) would render the first three sentences of § 7(b) almost completely superfluous, contrary to the determination in *Lorillard* concerning the "selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices." 434 U.S. at 583.

Ultimately, TWA argues that there is no indication in the legislative history of the ADEA that Congress specifically addressed the issue of remedies for union violations of the ADEA, and that such Congressional silence, in the context of express prohibitions of union violations, is suf-

⁴² See also *Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 810; *Vazquez v. Eastern Airlines, Inc.*, 579 F.2d 107; *Dean v. American Security Insurance Co.*, 559 F.2d 1036. But see *EEOC v. Air Line Pilots Association, International*, 489 F. Supp. at 1009, holding that the EEOC could recover backpay against ALPA, based on a reading of the general "legal or equitable relief" language in § 7(b) to supersede the "reference in § 626(b) to the FLSA."

ficient to authorize damages remedies. Whatever force that argument may have with respect to statutes where Congress has merely enacted a substantive regulation and left the development of remedies and procedures to the courts, it is unavailing where Congress has manifested its intent to have the courts apply the comprehensive remedies and procedures of an incorporated statutory scheme.⁴³ By its express incorporation of the remedial scheme of the FLSA into the ADEA, Congress plainly manifested its intent to make § 16 and § 17 of the FLSA the measure of monetary remedies available in ADEA actions. See *Lorillard*, 434 U.S. at 582; *Neuman v. Northwest Airlines*, 28 Fair Empl. Prac. Cases (BNA) at 1489. Section 7(b) does not create an additional damages remedy against unions.⁴⁴

⁴³ In *La Chapelle v. Owens-Illinois*, 513 F.2d 286 (5th Cir. 1975), the Court rejected the argument that the "written consent" requirement for participation in class actions authorized by § 16(b) of the FLSA should not be incorporated in § 7(b) in the absence of a discussion of that issue in the legislative history of ADEA, so as to best effectuate the purposes of the ADEA. 513 F.2d at 289.

Had Congress desired to read out the [written consent requirement in] the third sentence [of § 16(b)] it could have done so. It has not, and we may not. Any argument that the inclusion of the consent requirement undercuts the broad remedial purposes of ADEA should be made to the legislature and not to the courts.

513 F.2d at 289 n.10.

⁴⁴ In describing the provision in the 1978 ADEA amendments expanding the right to a jury trial recognized in *Lorillard*, the House Conference Committee Report reaffirmed that Section 7(b) of the ADEA "incorporates the remedial scheme of Sections 11(b), 16 and 17 of the FLSA," and referred to FLSA caselaw to explain the concept of ADEA liquidated damages. H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 13-14, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 529, 535. These references to the legal remedies provided in FLSA actions, at a time subsequent to lower court decisions construing § 16 and § 17 of the FLSA not to provide monetary remedies against labor organizations, are additional evidence that the remedies available in ADEA actions are limited to those

D. The Policy Considerations Offered by TWA Do Not Justify Judicial Fashioning of Additional ADEA Remedies against Labor Organizations.

Unlike § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), on which TWA and employer *amici* rely, neither § 7(b) of the ADEA, nor § 16 and § 17 of the FLSA, expressly provide for monetary relief against a union. This fundamental difference undercuts TWA's suggestion that this Court need only take into account that the substantive prohibitions against union violations in § 4(c) of the ADEA are identical to the prohibitions in § 703(c) of Title VII, 42 U.S.C. § 2000e-2(c), and that the general language concerning appropriate legal and equitable relief in § 7(b) of the ADEA is analogous to general remedial language in § 706(g) of Title VII. Moreover, as this Court specifically emphasized in *Lorillard*, "rather than adopting the procedure of Title VII for ADEA actions, Congress rejected that course in favor of incorporating the FLSA procedure even while adopting Title VII's substantive provisions." 434 U.S. at 584-85.⁴⁵

TWA's analogy to remedies under the judicially implied duty of fair representation is likewise misplaced. As this Court emphasized in holding that punitive damages are not available against a union which breaches its duty of fair representation:

provided in § 16 and § 17 of the FLSA absent a specific express modification of that FLSA remedial scheme in the ADEA. Cf. *Pfeiffer v. Essex Wire Corp.*, 682 F.2d at 687 (finding the legislative history of the 1978 ADEA amendments "highly persuasive, if not dispositive" of Congressional intent to disallow damages beyond what is provided in the remedial scheme of the FLSA). Accord *Brin v. Bigsby and Kruthers*, 19 Fair Empl. Prac. Cases (BNA) 415 (N.D. Ill. 1979).

⁴⁵ "[T]he very different remedial and procedural provisions under the ADEA [as contrasted to Title VII] suggest that Congress had a very different intent in mind in drafting the later law." *Lorillard*, 434 U.S. at 585 n.14.

We are concerned here with judicially created remedies for a judicially implied cause of action. Whether the explicit statutory language of [other statutes] and [their] accompanying legislative history authorize punitive damages awards obviously involves different considerations.

International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42, 47 n.9 (1979). The role of the federal courts in creating remedies under the duty of fair representation is "fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt." *Northwest Airlines*, 451 U.S. at 97. "[W]hen Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement," such as the EPA or the ADEA, "[t]he judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs." *Id.*

TWA and employer amici further suggest that the policies of the federal labor laws so unambiguously favor judicial recognition of a damages remedy against a labor organization in an ADEA action as to override the express Congressional intent to incorporate the remedies provided in § 16 and § 17 of the FLSA. The fallacy in the overall analysis is demonstrated by TWA's final argument that union liability for liquidated damages "follows *a fortiori*" from the "principle of monetary liability."⁴⁶ TWA Br. at 43 n.59. The statutory schemes on which TWA relies (Title VII; the Labor Management Relations Act, 29 U.S.C. §§ 141-187; and the Railway Labor Act, 45 U.S.C. §§ 151-188) to establish an abstract "principle of monetary liability" do not provide a liquidated

⁴⁶ A "principle of monetary liability" only exists within the context of the statute which creates the prohibition on which that remedy is based. See *Texas Industries, Inc. v. Radcliff Materials*, 451 U.S. 630, 642-45 (1981); *Northwest Airlines*, 451 U.S. at 97.

damages remedy. It is absurd to suggest that the federal courts could declare that backpay awards under Title VII can include liquidated damages because Title VII and the ADEA share "important similarities . . . in their aims and in their substantive prohibitions." TWA Br. at 42, quoting *Lorillard*, 434 U.S. at 584. This Court has flatly declined any such invitation to engage in judicial legislation in the guise of statutory construction. *Northwest Airlines*, 451 U.S. at 97.

It is for Congress to determine the scope of relief for violations of the prohibitions it enacts, and to strike the balance between those remedies which will most precisely further compliance and those that will overly harm legitimate competing values.⁴⁷ The different statutory schemes implicated in this case reflect various Congressional resolutions of these issues. In the FLSA, Congress made it unlawful for employers, but not labor organizations, to enter into collective bargaining agreements which violate § 6(a) and § 7 of that Act,⁴⁸ and provided for recovery of unpaid wages as well as double damages and criminal sanctions as remedies. Title VII creates an express backpay remedy against employers and labor organizations which violate the Act, but it makes the back-

⁴⁷ See generally, *Texas Industries*, 451 U.S. at 635, 637 (determining "whether sharing of damages liability will advance or impair the objectives of the antitrust laws" requires consideration of the "problem of 'overdeterrence,' i.e., the possibility that severe antitrust penalties will chill wholly legitimate business agreements.")

⁴⁸ The FLSA, which was designed to give specific minimum protections to individual workers and to ensure that each employee covered by the Act would receive "[a] fair day's pay for a fair day's work" and would be protected from "the evil of 'overwork' as well as 'underpay,'" *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981), prohibits employers, but not unions, from entering into collective bargaining agreements contrary to § 6 and § 7 of the FLSA. 450 U.S. at 740-41, and cases cited therein.

pay award discretionary and provides neither criminal sanctions nor liquidated damages. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975); *Lorillard*, 434 U.S. at 584 & n.13.⁴⁰

The perceived "unfairness" of different balances of economic interests embodied in different statutory schemes may not be adjusted by judicial selection of the most reasonable provisions of arguably analogous statutes. "The equitable considerations advanced by petitioner are properly addressed to Congress, not to the federal courts. Congress is best able to evaluate these policy considerations." *Northwest Airlines*, 451 U.S. at 98 n.41. *Accord Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646-47 (1981). See generally *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980) ("balancing of competing values and interests . . . in our democratic system is the business of elected representatives," not the courts).

TWA argues that differences between the purposes of the FLSA and the ADEA, and the limited "applicability of the FLSA to unions," "explains why it is only logical for some of the remedies under the FLSA to differ from those of the ADEA." TWA Br. at 41. This argument, even if correct, would not justify judicial creation of a new remedy in a comprehensive remedial scheme. Moreover, TWA's conclusion does not logically follow even if the premises were true. For example, each statutory scheme prohibits both union and employer retaliation against an employee who participates in enforcement proceedings (compare 29 U.S.C. § 215(a)(3) with 29 U.S.C. § 623(d)); the purposes underlying these provisions are identical, but the scope of remedies and enforcement procedures differ greatly. Likewise, the EPA,

⁴⁰ It was precisely such differences in the remedial schemes that led the Court in *Lorillard* to conclude that Title VII "sheds no light on congressional intent" in construing the remedial scheme of ADEA. *Lorillard*, 434 U.S. at 585.

the ADEA, and Title VII prohibit employer discrimination in violation of each act,⁵⁰ yet Congress selected different remedies for employer violations of these similar provisions.

Moreover, TWA's premise of the FLSA's "limited applicability" to unions does not bear close inspection. Where the majority of employees in a bargaining unit represented by a union prefer some other economic benefit to statutory overtime compensation, a union may attempt to bargain for and obtain an agreement in violation of §7 of the FLSA.

Since a union's objective is to maximize overall compensation of its members, not to ensure that each employee receives the best compensation deal available . . . a union balancing individual and collective interests might validly permit some employees' statutorily granted wage and hour benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole.

Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 742 (1981) (citations and footnotes omitted).

While a union might attempt to negotiate for mandatory retirement of older employees,⁵¹ it might also seek to trade wage increases or other benefits favoring younger employees to secure improved retirement benefits.⁵² TWA has no basis to assume that any one of these situations is more or less likely to occur than another. Nor is it the proper role of the courts to engage in speculation con-

⁵⁰ Compare § 6(d)(1) of the FLSA, 29 U.S.C. § 206(d)(1) with § 4(a) of the ADEA, 29 U.S.C. § 623(a), and § 703(a) of Title VII, 42 U.S.C. § 2000e-2(a).

⁵¹ See, e.g., *McMullans v. Kansas, Oklahoma and Gulf Railroad*, 229 F.2d 50 (10th Cir.), cert. denied, 351 U.S. 918 (1956).

⁵² See *Buchholtz v. Swift & Co.*, 609 F.2d 317, 319, 327-28 (8th Cir. 1979).

cerning such legislative facts as whether collective bargaining agreements are more or less likely to violate the wage and hour provisions of the FLSA than the prohibitions of the ADEA. See generally *Texas Industries v. Radcliff Materials*, 451 U.S. at 646-47.

The "extensive fact-finding undertaken by the Executive Branch and Congress" in enacting the ADEA, *EEOC v. Wyoming*, — U.S. —, 103 S.Ct. 1054, 1057 (1983), does not support TWA's premise.⁵³ While the

⁵³ TWA, and employer amici, do not refer to any portion of the Congressional hearings, or any other aspect of the legislative history prior to the enactment of the ADEA, in which Congress was presented with evidence that unions played a substantial role in promoting or maintaining arbitrary age discrimination practices. The Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* ("Report"), a significant element in the fact-finding process leading to the enactment of the ADEA, *EEOC v. Wyoming*, 103 S.Ct. at 1058, focused on employer attitudes and practices, and only referred to collective bargaining as a significant factor in retirement plans and seniority systems. Report at 21-46, 53-61. With respect to the former, Congress decided not to prohibit mandatory retirement pursuant to a bona fide employee benefit plan, notwithstanding union objections to that exemption. *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 202 (1977). With respect to seniority rights, the Report emphasized the advantages of seniority to incumbent older workers and the central role of unions in developing seniority rights. Report at 54, 57-59.

In stark contrast, the legislation that ultimately emerged as Title VII was based on hearings in which voluminous evidence was presented to Congress which implicated labor unions in racial discrimination in employment, most notably in union hiring halls and apprenticeship training programs in the construction industry. See H.R. Rep. No. 570, 88th Cong., 1st Sess. 2, 3 (1963); S. Rep. No. 867, 88th Cong., 2d Sess. 5, 6, 11, 22 (1963); *Equal Opportunity in Employment: Hearings on H.R. 405 and Similar Bills Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 88th Cong., 1st Sess. 20, 21, 66-69, 71-72, 97-98, 142-55, (1963); *Equal Opportunity in Employment: Hearings on S. 773, 1210, 1211, 1937 Before the Subcomm. on Employment and Man-*

statement of the representative of the AFL-CIO acknowledged that the ADEA prohibited age discrimination by unions, he also affirmed that:

[t]he labor movement, through its international and local unions, has consistently been in the forefront of efforts to deal with the problems of older workers. In collective bargaining agreements we have endeavored to deal with some of the problems of age discrimination in employment, and in Convention resolutions we have called attention to the need for legislation, at both the state and Federal levels, to prevent such discrimination.

Age Discrimination in Employment: Hearings on H.R. 3651, 3768, 4221 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 95th Cong., 1st Sess. 418 (1967) (statement of Kenneth A. Meiklejohn, Legislative Representative, AFL-CIO). The subsequent enforcement history of the ADEA adds little to the original Congressional factfinding: aside from cases involving the impact of the FAA Age 60 Rule on flight deck crew working conditions, only eight reported cases since the enactment of the ADEA have involved labor organization defendants.⁵⁴

TWA's policy arguments, plainly do not provide a more reliable guide to statutory construction than the Congress-

power of the Senate Comm. on Labor and Public Welfare, 88th Cong., 1st Sess. 158-67, 178, 199-200, 401-02 (1963).

⁵⁴ *de Loraine v. MEBA Pension Trust*, 499 F.2d 49 (2d Cir. 1974); *Moon v. Aeronca, Inc.*, 541 F. Supp. 747 (S.D. Ohio 1982); *Rodgers v. Grow-Kiewit Corp.*, 93 Lab. Cas. (CCH) ¶ 13,431 (S.D.N.Y. 1981); *Rhoades v. Book Press*, 458 F. Supp. 674 (D. Vt. 1978); *Balc v. United Steelworkers*, 6 Fair Empl. Prac. Cases (BNA) 824 (W.D. Pa. 1973); *Chaudoin v. ALPA*, 6 Fair Empl. Prac. Cases (BNA) 107 (D.D.C. 1973); *Hart v. United Steelworkers*, 350 F. Supp. 294 (W.D. Pa. 1972), vacated as moot, 482 F.2d 282 (3d Cir. 1973); *Kincaid v. United Steelworkers*, 5 Fair Empl. Prac. Cases (BNA) 235 (N.D. Ind. 1972). None of these cases resulted in findings of union violations of the ADEA.

sional choices embodied in the statutory language of § 7 (b) incorporating the remedial scheme of the FLSA into the ADEA.

CONCLUSION

For all the foregoing reasons and those set forth in the brief of ALPA as petitioner in No. 83-1325, the judgment of the United States Court of Appeals for the Second Circuit should be vacated to the extent that it holds that ALPA and TWA violated the ADEA; or, in the alternative, that portion of the judgment that holds that ALPA is not responsible for damages to any of the plaintiffs should be affirmed.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

AGE DISCRIMINATION IN EMPLOYMENT ACT

Section 4, 29 U.S.C. § 623, Prohibition of Age Discrimination:

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

* * * *

(c) It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be unlawful for an employer to discriminate against any of his employees or applicants

for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

Sections 7(b), 29 U.S.C. § 626(b), (c), Enforcement:

(b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged,

and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) (1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

FAIR LABOR STANDARDS ACT

Sections 3(a), (b), 29 U.S.C. § 203(a), (b), Definitions:

As used in this chapter—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

Section 6, 29 U.S.C. § 206, Minimum Wage:

(a) Every employer shall pay to each of his employees who in any workweek is engaged in com-

merce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than \$2.65 an hour during the year beginning January 1, 1978, not less than \$2.90 an hour during the year beginning January 1, 1979, not less than \$3.10 an hour during the year beginning January 1, 1980, and not less than \$3.35 an hour after December 31, 1980, except as otherwise provided in this section;

(2) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employ-

ers, agents, contractors, and subcontractors shall cause goods to be produced by home workers;

(3) if such employee is employed in American Samoa, in lieu of the rate or rates provided by this subsection or subsection (b) of this section, not less than the applicable rate established by the Secretary of Labor in accordance with recommendations of a special industry committee or committees which he shall appoint in the same manner and pursuant to the same provisions as are applicable to the special industry committees provided for Puerto Rico and the Virgin Islands by this chapter as amended from time to time. Each such committee shall have the same powers and duties and shall apply the same standards with respect to the application of the provisions of this chapter to employees employed in American Samoa as pertain to special industry committees established under section 205 of this title with respect to employees employed in Puerto Rico or the Virgin Islands. The minimum wage rate thus established shall not exceed the rate prescribed in paragraph (1) of this subsection;

(4) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement); or

(5) if such employee is employed in agriculture, not less than the minimum wage rate in effect under paragraph (1) after December 31, 1977.

* * * *

(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(2) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which

exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Section 7, 29 U.S.C. § 207, Maximum Hours:

(a) (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified

at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty-hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) of this section or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if—

(A) the annual gross volume of sales of such enterprise is less than \$1,000,000 exclusive of excise taxes,

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale,

and such employee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under section 206 of this title, and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

* * * *

(f) No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) of this section if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees,

if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

Section 11(a), 29 U.S.C. § 211(a), Inspections:

(a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter. Except as provided in section 212 of this title and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 212 of this title, the Administrator shall bring all actions under section 217 of this title to restrain violations of this chapter.

Section 15(a)(2), (3), 29 U.S.C. § 215(a)(2), (3), Prohibited Acts:

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—

* * *

- (2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under section 214 of this title;
- (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

* * *

Section 16, U.S.C. § 216, Penalties; Civil and Criminal Liability; Injunction Procedures Terminating Right of Action; Waiver of Claims; Actions by Secretary of Labor:

- (a) Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.
- (b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief

as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of this action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

- (c) The Secretary is authorized to supervise the payment of the unpaid minimum wages or the un-

paid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determin-

ing when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

Section 17, 29 U.S.C. § 217, Injunction Proceedings:

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title).

TITLE VII, CIVIL RIGHTS ACT OF 1964

Section 703(c), 42 U.S.C. § 2000e-2(c), Unlawful Employment Practices:

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 706(g) 42 U.S.C. § 2000e-5(g), Enforcement Provisions:

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring,

16a

reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

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Nos. 83-997 and 83-1325

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

TRANS WORLD AIRLINES, INC., PETITIONER

v.

HAROLD H. THURSTON, ET AL.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
PETITIONER

v.

HAROLD H. THURSTON, ET AL.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**BRIEF FOR THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

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QUESTIONS PRESENTED

1. Whether Trans World Airlines (TWA) violated the Age Discrimination in Employment Act by involuntarily retiring airline pilots at age 60, when they are disqualified from serving as pilots, because it refused to allow them to transfer to other jobs after age 60 although all younger, similarly-situated pilots were allowed to do so.

2. Whether TWA's violation of the Age Discrimination in Employment Act was willful.

3. Whether unions are liable for back pay under the Age Discrimination in Employment Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-997

TRANS WORLD AIRLINES, INC., PETITIONER

v.

HAROLD H. THURSTON, ET AL.

No. 83-1325

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
PETITIONER

v.

HAROLD H. THURSTON, ET AL.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A39)¹ is reported at 713 F.2d 940. The opinion of the district court (Pet. App. A44-A61) is reported at 547 F. Supp. 1221.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1983, and rehearing was denied on November 10, 1983 (Pet. App. A41-A42). The petition for a writ of certiorari in No. 83-997 was filed on December 16, 1983, and granted on February 27, 1984; the cross-petition (No.

¹ "Pet. App." references are to the Appendix to the Petition in No. 83-997.

83-1325) was filed on February 8, 1984, and granted on April 2, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Sections 4(a), (c), (f) (1), (2) and 12(a) of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. 623(a), (c), (f) (1), (2) and 631(a); and Section 121.383(c) of the Federal Aviation Administration Regulations (14 C.F.R.), are set forth at 83-997 Pet. 2-5. Section 7(c) (1) and (e) (1) of the ADEA (29 U.S.C. 626(c) (1) and (e) (1)); Sections 16(b), (c) and 17 of the Fair Labor Standards Act, as amended (29 U.S.C. 216(b), (c) and 217); and Sections 6(a), 10(a) and 11 of the Portal-to-Portal Pay Act of 1947 (29 U.S.C. 255(a), 259(a) and 260) are set forth in a statutory appendix to this brief (App., *infra*, 1a-4a).

STATEMENT

This case began on November 14, 1978, when Harold Thurston and Christopher Clark brought suit against Trans World Airlines, Inc. (TWA) and the Air Line Pilots Association (ALPA), the pilots' bargaining representative, challenging their involuntary retirement at age 60 as a violation of the ADEA.² The Equal Employment Opportunity Commission (EEOC) intervened as plaintiff on behalf of other involuntarily retired TWA captains and other crew members adversely affected by TWA's practice of imposing more restrictive transfer rules on those seeking transfers because of their age than on those seeking transfers for other reasons. The district court granted summary judgment to TWA and ALPA (Pet. App. A57-A61). The court of appeals reversed, finding that the dis-

² Thurston, Clark and a third plaintiff, Clifton Parkhill, were captains for TWA who sought to continue working by transferring to flight engineer positions. Such a transfer was necessary to their continued employment on the flight deck because of an FAA regulation requiring captains, but not flight engineers, to be under 60 years of age (14 C.F.R. 121.383(c)).

trict court had ignored direct evidence of discrimination, and entered judgment for plaintiffs (Pet. App. A24).³

A. Background Facts⁴

TWA, a commercial airline certified by the Civil Aeronautics Board and operating under Part 121 of the Federal Aviation Regulations (14 C.F.R. Pt. 121), employs approximately 3000 pilots in four cockpit positions (C.A. App. 930, 991-992).⁵ The captain commands the aircraft and is responsible for all phases of its operation (C.A. App. 250, 339). The first officer assists or relieves the captain as co-pilot (*ibid.*). The flight engineer (called second officer on some airlines) is primarily responsible for monitoring the mechanical, electrical, and electronic functioning of the aircraft (C.A. App. 250, 340). On certain long-distance flights there is a fourth crew member, an International Relief Officer (IRO), who acts as third in command and who performs both flight engineer and first officer duties, except aircraft takeoff and landing (C.A. App. 330, 339-340, 350-352).

³ In a separate action, ALPA brought suit against TWA, charging that the company's practice of allowing anyone to serve in the cockpit beyond the age of 60 was a unilateral change in the pilots' rates of pay, rules, or working conditions in violation of Section 6 of the Railway Labor Act (RLA), 45 U.S.C. 156. ALPA also sought a declaratory judgment that the ADEA amendments did not require any changes in TWA's practice of mandatorily retiring all pilots at age 60 (C.A. App. 108-113). The district court dismissed ALPA's suit on summary judgment (Pet. App. A50-A54) and the court of appeals affirmed (Pet. App. A13-A21). ALPA has not sought review of that dismissal in this Court.

⁴ The parties agreed in the court below that the case was appropriate for disposition on summary judgment as to liability (Pet. App. A5). The facts summarized derive principally from the affidavits or deposition testimony of TWA officials and from TWA's answers to interrogatories.

⁵ The TWA-ALPA collective bargaining agreement refers to all cockpit, or flight deck, positions as "pilot". We follow that usage herein, except where the context indicates otherwise.

A regulation promulgated by the Federal Aviation Administration (FAA) prohibits anyone from serving as a pilot on a commercial carrier beyond age 60 (FAA Age 60 Rule).⁶ Captains, first officers and IROs are considered "pilots" subject to this FAA regulation; flight engineers are not (C.A. App. 543-548, 1006, 1026).

The retirement plan for all pilots negotiated between TWA and ALPA, in effect at the time this dispute arose,⁷ provided that the "normal retirement date is the [pilot's] 60th birthday" and that "[pilots] must retire by their normal retirement date unless written approval by the company is granted for continuance in employment" (C.A. App. 401, 418). Those provisions have been in the plan for many years, and until 1978 TWA employed no one over age 60 as a pilot on its airplanes. The same retirement provision appears in the 1982 plan negotiated between TWA and ALPA. Pet. App. A8.

B. The Development and Operation of TWA's Age 60 Policy

Effective April 6, 1978, the ADEA was amended to prohibit the involuntary retirement of covered employees. Section 2(a), Pub. L. No. 95-256, 92 Stat. 189. For several months thereafter, TWA continued to retire all pilots at age 60. However, on July 19, 1978, the company announced a new policy in a letter from David Crombie, TWA Senior Vice President for Administration, to ALPA that stated that TWA was legally obligated to employ all pilots as flight engineers beyond age 60 and to offer to

⁶ The regulation states:

"No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday." See 14 C.F.R. 121.383(c).

⁷ The retirement plan, like the collective bargaining agreement between ALPA and TWA ("Working Agreement"), became effective October 1, 1977 (C.A. App. 401, 403-404).

reinstate as flight engineers all pilots mandatorily retired after April 6, 1978 (C.A. App. 426-428).⁸ The text of the letter made clear that TWA contemplated no "bidding" requirement for captains who wished to be recalled to or to continue employment as flight engineers beyond the age of 60.⁹

The Crombie letter also indicated that no change would be made until ALPA presented its views (C.A. App. 428).

⁸ Crombie's position was based on his view of the requirements of the ADEA, and the risk of "the double damage penalty for a willful violation" (Hilly Deposition, July 7, 1980, at 72). He had received legal advice on this matter (*id.* at 104).

⁹ The letter from Crombie to the Chairman of the TWA Master Executive Council (TWA-MEC) of ALPA stated in pertinent part (C.A. App. 426-427):

[T]he Company believes the 1978 Amendments, the pertinent FARs [Federal Aviation Regulations], the Working Agreement and the Railway Labor Act require that the following steps be taken by it and the Association:

1. Advice be given to all pilots and flight engineers that they will not be compelled to retire solely because they have reached age 60, the mandatory retirement age under their pension plans.
2. Advice be given to all pilots and flight engineers who have retired upon reaching age 60 after April 6, 1978, that they are eligible for reemployment by the Company as flight engineers without loss of seniority provided they advise the Company of their intention to seek reemployment promptly and thereafter report for work without undue delay.

Consistent with Crombie's letter, the Chairman of the TWA-MEC had previously informed Council members on June 21, 1978 (C.A. App. 1027-1040):

TWA is tentatively planning imminent announcement of plans to retain pilots and flight engineers in active employment after age 60, with duty as flight engineer. Also, pilots and flight engineers who have retired since April 6, 1978 will be offered opportunity to return as flight engineer. Captains and first officers desiring training as flight engineer will be so qualified. All of the above is in accordance with the "Age Discrimination In Employment Act" which became effective April 6, 1978, and with our Working Agreement.

These views, communicated to TWA during the summer of 1978, showed ALPA to be completely opposed to the employment of any pilot beyond age 60, even as flight engineer (C.A. App. 1027, 1033-1037, 1041-1049, 1050-1056).

When Crombie was hospitalized shortly after the letter was dispatched, responsibility for development of policy on the age 60 question was transferred to J. Edward Frankum, TWA's Vice President of Flight Operations. Unlike Crombie, Frankum opposed the employment of pilots beyond age 60 and did not agree with the position stated in Crombie's July 19th letter (C.A. App. 828-836, 1000-1005, 1022, 1027-1029). Frankum stated that after Crombie was hospitalized, "I, in effect disavowed [that] letter and we proceeded from there" (C.A. App. 1005A).¹⁰

On August 10, 1978, Frankum caused TWA to issue a brief bulletin to its personnel stating that "any cockpit crewmember who is in flight engineer status at age 60 may not be compelled to retire" (C.A. App. 425, 1006-1007). The bulletin did not indicate whether captains or first officers would be permitted to downgrade to flight engineer status, or if so, by what procedure.

After August 10, TWA offered reinstatement to the flight engineers and IROs who had been involuntarily retired between April 6 and August 10, 1978 (C.A. App. 846, 849 (Resp. 3c), 623, 630 (Resp. 13)). Five retirees

¹⁰ Frankum's deposition testimony confirmed that he had forcefully expressed his views to Crombie (Frankum Deposition July 9, 1980, at 156-158):

Q. Did you have any [conversations with Crombie] on the subject of the age sixty legislation?

A. Of course.

Q. Can you tell us what you said in any of those discussions?

A. Yes. I told him that I didn't want to fly anybody past age sixty.

Q. Did you discuss it any further than that?

A. I told him that him and his lawyers were full of it.

Q. What else was said?

A. That sums it up.

accepted the offer and were reinstated (C.A. App. 463, 930, 997-998).¹¹ None of the three original plaintiffs or EEOC claimants who were forced to retire as captains during this period was offered reinstatement.¹² Flight engineers and IROs reaching their 60th birthdays after August 10, 1978, have been allowed to continue employment as flight engineers (C.A. App. 930, 937, 971). A TWA captain or first officer is mandatorily retired on his 60th birthday, however, unless he has bid on and been awarded a flight engineer vacancy with an effective date before his 60th birthday (C.A. App. 184, 186-187 (¶ 11)).¹³ TWA refuses to honor a bid for a vacancy effective after a captain's 60th birthday on the ground that "[bids] can only be awarded to somebody on the seniority list and at age 60 a man goes off the seniority list" (C.A. App. 930, 974). The only pilots who go "off the seniority list", however, are captains and first officers at age 60 because, according to TWA, they are required to be retired on that date under the FAA Age 60 Rule (C.A. App. 184, 187 (¶ 13), 930, 974-980, 990, 852, 856-860 (Resp. 12)). The TWA-ALPA Working Agreement does not require extinguishing the

¹¹ International Relief Officers were offered reinstatement despite the fact that they are subject to the FAA Age 60 Rule, just as captains and first officers are (C.A. App. 1026).

¹² There were initially thirteen former TWA captains—three original plaintiffs and ten EEOC claimants—challenging their involuntary retirement. Three of the EEOC claimants have settled with TWA (see note 20, *infra*). Of the remaining ten captains, three became 60 before August 10, 1978. Private plaintiff H. Thurston was retired on June 11, 1978, after his request to continue employment beyond age 60 was denied by the company on May 26, 1978 (C.A. App. 903-905, 909-910, 647). EEOC claimant A.M. Lusk was retired on May 2, 1978, and TWA denied his October 1978 request to be recalled as a flight engineer (C.A. App. 576, 581-582, 592, 645-646). EEOC claimant L.D. Bobzin was retired on May 9, 1978, after his request to continue employment was denied (C.A. App. 643-644).

¹³ The effective date of a vacancy is the date on which a pilot is expected to assume the new position (C.A. App. 930-932).

seniority of captains and first officers who are barred from continuing in these positions by virtue of the FAA Age 60 Rule. Rather, Section 17 of the Agreement, entitled "Seniority", simply provides that "[a]ny pilot whose services with the Company are permanently severed shall forfeit his seniority rights" (C.A. App. 250, 294 (Section 17(A) (6))).¹⁴

As a direct result of TWA's "effective date" bidding restriction, six of the seven captains in this litigation who turned 60 after August 10 were involuntarily retired. Two were retired after filing bids because their 60th birthdays arrived before September 1, 1978, the effective date of the first flight engineer vacancies to be announced after August 10 (C.A. App. 184, 187 (¶¶ 12-14), 468-470).¹⁵ The four others, who reached age 60 after September 1, 1978, were nonetheless retired because no vacancies were posted subsequent to their bids which carried effective dates preceding their sixtieth birthdays.¹⁶

¹⁴ While age 60 captains unable to secure flight engineer vacancies are severed from employment, TWA, at its discretion, currently allows younger pilots extended, unpaid "personal time off." These leaves can be requested for any reason, are granted in one-month increments, and are rarely denied. In any given month, 7 to 12 pilots are on personal leave (C.A. App. 930, 962-965).

¹⁵ TWA refused to honor the bid filed by private plaintiff C. A. Parkhill on August 15 because the September 1st vacancies fell nine days beyond the date of his 60th birthday, August 22, 1978 (C.A. App. 911, 913, 916-918). EEOC claimant R. Gowling was retired on August 27, 1978, his 60th birthday, because the September 1st vacancies fell four days thereafter (C.A. App. 576, 581-582, 592).

¹⁶ EEOC claimant T.M. Widmayer placed a bid on November 1, 1978, and was retired on his sixtieth birthday, November 10, 1978 (C.A. App. 576, 581-582, 592). EEOC claimant A.T. Humbles filed a bid on June 5, 1979, but there was only one vacancy between that date and September 14, 1979, when Humbles turned 60, and that was awarded to a "career flight engineer" with priority bidding rights to flight engineer vacancies (C.A. App. 576, 581-582, 592, 496-499). EEOC claimant D.V. Roquemore was retired when he

After the August 10 bulletin establishing the "effective date" requirement, TWA imposed two additional restrictions on downbidding captains. Both restrictions were advocated by ALPA and adopted in 1980 (C.A. App. 1041, 1063-1069, 1074-1077).¹⁷ The first of these requires successful captain downbidders to "fulfill their bids in a timely manner" (*ibid.*). At first, captains who bid successfully for flight engineer vacancies were allowed to fly as captains until they became 60, and were then scheduled for flight engineer training.¹⁸ Under the

turned 60 on August 21, 1981, because the next available vacancy after his bid carried an effective date ten days beyond his birthday.

Private plaintiff C.J. Clark was retired when he turned 60 on September 19, 1978. Clark wrote to TWA in July 1978 requesting continued employment beyond age 60 (C.A. App. 929). In a letter dated August 3, 1978, TWA responded that, for the time being, Clark would not be permitted to work as a flight engineer beyond age 60. The letter went on to state that "should our policies ultimately be such that they would have permitted you to continue to work after attaining age 60, you will be reinstated effective on your sixtieth birthday, with the pay and benefits then applicable to flight engineers who continue to work after age sixty" (C.A. App. 648). In light of this letter, Clark believed that he need not file a bid for a flight engineer vacancy in order to continue working in that position after his sixtieth birthday (C.A. App. 919, 922-924). If he had bid on the vacancies that became effective on September 1, 1978, Clark would have been awarded one based on his seniority relative to that of other bidders (C.A. App. 919, 925-928).

¹⁷ ALPA also suggested other restrictions that would have adversely affected older pilots. For example, the union proposed that TWA furlough over-age-60 flight engineers before other engineers, regardless of company seniority, or that over-age-60 flight engineers be assigned a new seniority date corresponding to the date upon which they qualify as flight engineers (C.A. App. 1041, 1046-1066).

¹⁸ For example, Ruble, who turned 60 on January 28, 1979, was not scheduled for training until March 26, 1979 (C.A. App. 675, Line 1). Lundberg, who turned 60 on February 9, 1979, also was not scheduled for training until March 26, 1979 (C.A. App. 675, Line 2). These and other downbidders who turned 60 in 1979 were placed on vacation status at captains' pay between their 60th birthday and the date upon which their training began (C.A. App. 930, 986-988).

amended practice, captains who have secured flight engineer bids are required to activate them immediately, even before their 60th birthdays (C.A. App. 1041, 1070-1071). The result is that most downbidding captains are trained for and assume flight engineer positions before age 60, with a concomitant loss in pay and responsibility, whereas before implementation of this rule virtually all downbidders were permitted to complete their full careers as captains. (Compare training dates and birth dates of downbidding captains in 1979 and in 1980-1981 at C.A. App. 568, 570 (Resp. 6), 574).¹⁹

The second restriction further limited bidding rights. Under prior practice a successful downbidder was placed in off-duty-without-pay status after his 60th birthday if he had not then passed the written examination prepared by the FAA as a prerequisite for pilot entry into flight engineer training (C.A. App. 473-476). In January 1980, however, TWA began cancelling the bid of any captain who has not passed the flight engineer examination when reporting for training (C.A. App. 477-480). This practice, operating in conjunction with the "effective date" requirement, precipitated the retirement of three of the EEOC's original ten claimants.²⁰

¹⁹ While TWA now immediately schedules successful downbidders for training, it has deferred training for younger pilots where the scheduled training dates cause personal hardship (C.A. App. 930, 935-936, 980-982).

²⁰ T. Emrich and J.L. Clark were retired after their bids were cancelled and their subsequent rebids failed for lack of vacancies carrying an effective date prior to their sixtieth birthdays (C.A. App. 872-873, 846-847, 850-851). Both have since settled with TWA, as has EEOC claimant R.F. Adickes who was retired after sickness prevented him from reporting for training and his bid was cancelled.

EEOC claimant H.W. Lewis was awarded a bid effective October 31, 1979. He was originally informed that if he failed to pass the written examination before his training date, he would be placed on leave without pay until he passed it. On January 15, 1980, he received a scheduled training date and a warning that failure to pass the examination would result in cancellation of his

C. TWA's Captain Downbidding Procedures Compared to Other Methods of Pilot Transfer

The bidding system procedure that TWA applied to the captains approaching age 60²¹ is not the only method provided in the Working Agreement with ALPA to permit pilots to move from one position to another. For pilots who are compelled to vacate their positions because of non-age related reasons, the Working Agreement specifies transfer procedures that do not involve bidding and do not result in discharge if no transfer is available. The Working Agreement thus provides that a captain or first officer who is unable to maintain a first-class medical certificate, which is required for those positions by the FAA, may automatically "displace" or "bump" a less senior flight engineer, and thereby assume his position, if the medically disabled pilot can acquire the second-class medical certificates required for that position. C.A. App. 250, 302-303 (Section 19(A)(3), (A)(4)(a)). In that situation, assignment to flight engineer status is not conditioned upon the existence of a flight engineer vacancy (C.A. App. 623, 626-627 (Resp. 6)). Moreover, if the disabled pilot lacks sufficient seniority to displace, he is not discharged. Rather, he is entitled to go on unpaid

bid. Mr. Lewis declined to take the examination or appear for training because he wished to continue to fly as captain until his 60th birthday, on November 4, 1980. His bid was therefore cancelled and his rebid, filed September 24, 1980, failed for lack of appropriate vacancies (C.A. App. 501-510, 846-847, 850-851).

²¹ Under this system, a pilot who wishes to transfer from one "status" (position) to another, or from one "domicile" (base location) to another, files a bid for the desired vacancy. Vacancies are generally announced as they arise. Bids can be filed in advance of specific vacancy announcements ("Standing Bid") or in response to those announcements ("Telegram Bid"). C.A. App. 184, 185 (¶¶ 3-10), 250, 302-304 (Section 19(A)(5), (A)(6), (B), (C)). Vacancies are awarded to qualified bidders in order of seniority, i.e., date of hire with the company. C.A. App. 184, 186 (¶ 8), 250, 294 (Section 17(A)(1), (A)(3)).

medical leave for up to five years, during which time he retains and continues to accrue seniority, and has a priority right to bid on and retain a flight engineer position in preference to any more senior pilot who is medically qualified for the captain or first officer seat. C.A. App. 250, 298-299 (Sections 18(B)), 302, 303 (Section 19(A)(4)(b)).

Similarly, the Working Agreement provides that a pilot whose position is eliminated at a domicile due to reduced manpower needs may use his seniority to displace the least senior pilot in any position at his current or last former domicile, or in his current position anywhere in TWA's system. C.A. App. 250, 311-312 (Section 19(G)). Like his medically disabled counterpart, the jobless pilot who lacks sufficient seniority to displace is not discharged. Rather, he is placed in furlough status, which may extend for a period of up to ten years, during which time he continues to accrue seniority for purposes of a recall (C.A. App. 861-869). Seniority governs reemployment after release due to such a reduction in force. C.A. App. 250, 294 (Section 17(A)(3)).²²

In addition, the Working Agreement provides that a pilot who fails training to upgrade to captain or first officer is not discharged, but is instead assigned to permanent flight engineer status at his permanent domicile, whether or not a flight engineer vacancy there exists (C.A. App. 250, 265-266 (Section 6(B)(16)), 930, 941-948). Similarly, as a disciplinary measure in response to demonstrated incompetence, TWA has frequently (C.A. App. 1006, 1024-1026) downgraded a pilot to a lower position for which he is qualified, without requiring the pilot to bid for a vacancy. C.A. App. 930, 972-973, 250, 266 (Section 6(B)(17)).

²² As of 1982, TWA was operating under a "furlough aversion" agreement with ALPA: it reduced the hours worked by all of the pilots in its system rather than furloughing pilots rendered surplus due to operational cutbacks (C.A. App. 930, 938-940).

D. Opinions Below

On motions for summary judgment, the district court ruled that TWA and ALPA were entitled to judgment against the Thurston plaintiffs and the EEOC as a matter of law. The court held, first, that plaintiffs could not establish a prima facie case of age discrimination, under the test set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), because none could show that a flight engineer vacancy existed "at the time [he] applied and [was] eligible for the job" (Pet. App. A57). The district court further held that the involuntary retirements and the downbidding requirements themselves fell within the exceptions provided by Section 4(f) of the ADEA, for the following reasons. Finding that the bidding procedures "follow a seniority system which was instituted for nondiscriminatory reasons and is applied in a neutral manner," the court concluded that "any denial of Flight Engineer status to pilots resulted from the neutral application of this bona fide seniority system and not by discriminatory treatment on the basis of age" (Pet. App. A60). The retirement of unsuccessful bidders, the court further stated, was "due solely to their reaching [age 60] while in the pilot status," an age which the court characterized as "a bona fide occupational qualification for airline pilots by virtue of the FAA regulations" (*ibid.*).

The court of appeals reversed. Noting that the *McDonnell Douglas* formula is not an "inflexible rule" (Pet. App. A23), the court below rejected the district court's mechanical application of the formula. Since direct proof of discriminatory treatment is just as probative as the circumstantial proof outlined in *McDonnell Douglas*, the court ruled that a prima facie case had been established by the evidence "that TWA grants the downgrading requests of all pilots with sufficient seniority except those of captains and first officers who reach age 60" (Pet. App. A24).

The court of appeals also rejected TWA's and ALPA's statutory defenses under Section 4(f)(1) and (2): petitioners' actions were not immune under Section 4(f)(2) because the involuntary retirement of captains at age 60 "is in no way mandated by the negotiated seniority system" (Pet. App. A26); and the retirements were not permissible under Section 4(f)(1), because it was undisputed that age 60 was not a BFOQ for flight engineers (Pet. App. A28).

Because ALPA "actively campaigned" in favor of retiring all pilots at age 60 and opposed any attempts by TWA at partial compliance with the ADEA, the court held the union to be jointly liable (Pet. App. A32-A33). However, it refused to order ALPA to pay any monetary relief (Pet. App. A38-A39). The court did order TWA to pay liquidated damages, since the record clearly showed that the company's discriminatory acts satisfied the standard adopted by the court for willful violations—the acts were knowing, intentional, and voluntary, and taken in reckless disregard of the ADEA's proscriptions (Pet. App. A33-A34).

SUMMARY OF ARGUMENT

TWA uniformly permits pilots who are disqualified from their current positions for non-age reasons to remain employed, to continue to accrue seniority and to transfer to a position for which they are qualified as soon as it is available. The company, with ALPA's encouragement and support, nevertheless denies these privileges to pilots who are disqualified because of age. This disparity in treatment is based solely on age and is thus in direct violation of the ADEA.

Section 4(f) of the ADEA permits an employer to take adverse personnel actions to observe the terms of a bona fide seniority system or where age is a bona fide occupational qualification reasonably necessary to the performance of the job involved. Neither exception excuses TWA's decision to establish especially stringent transfer policies for pilots approaching age 60. The injury chal-

lenged here is the forced retirement of captains and first officers at age 60, and their resulting exclusion from the seniority system. Nothing in either the FAA Age 60 Rule or the TWA-ALPA Working Agreement requires such forced retirement, or suggests that age 60 is a BFOQ for the flight engineer position. In any event, the seniority system exemption does not apply to involuntary retirements.

With respect to relief, the court below correctly determined the TWA willfully violated the Act and awarded liquidated damages pursuant to Section 7(b) of the ADEA. When an employer intentionally discriminates among its employees on the basis of their age, and knows or should know of the applicability of the ADEA, any violation of the Act is willful. This interpretation is consistent with the uniform interpretation of the language in the Portal-to-Portal Act from which the ADEA provision is derived, and best serves its compensatory purpose. Neither that purpose nor the cases support a requirement of specific intent.

Finally, we submit that the court below erred in exempting ALPA from any monetary liability for its clear statutory violation. The text, legislative history, and policies of the ADEA fully support the conclusion that unions which violate the Act's prohibitions are monetarily liable to the victims of their discrimination.

ARGUMENT

I. THE UNDISPUTED FACTS DEMONSTRATE THAT TWA'S AGE 60 POLICY CONSTITUTES A PER SE VIOLATION OF THE ADEA WHICH CANNOT BE JUSTIFIED UNDER THE EXCEPTIONS TO THE ACT

A. TWA's Practice of Involuntarily Retiring Captains and Refusing Their Transfer Requests At Age 60 is Unlawful

The ADEA prohibits an employer from discriminating against any employee between the ages of 40 and 70 "with respect to his compensation, terms, conditions, or

privileges of employment, because of such individual's age," and from limiting, segregating, or classifying its employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. 623(a)(1) and (2). The 1978 Amendments to the Act expressly forbid the involuntary retirement of any employee within the protected age group "because of the age of such individual" (29 U.S.C. 623(f)(2)). The court of appeals correctly held on undisputed evidence that TWA is in direct violation of these statutory prohibitions.

1. The policy that adversely affects TWA's captains here is age-based on its face. The company forces a captain to retire on his 60th birthday if he has not secured a flight engineer bid with an effective date prior to that date. TWA refuses to honor a bid for a vacancy carrying an effective date beyond a captain's 60th birthday because he is deemed to be retired at 60, and therefore stripped of the seniority that would entitle him to be awarded such a bid.

These facially age-based practices are not justified by the fact that a captain or co-pilot at age 60 is precluded from actively serving in those capacities by virtue of the FAA Age 60 Rule (14 C.F.R. 121.383(c)).²³ It is undisputed that TWA uniformly permits pilots who are disqualified from retaining their current positions for non-age related reasons to remain employed and to continue to accrue and exercise seniority. Such pilots thus may move, immediately or eventually, into positions for which they remain qualified. If any one of TWA's 3000 pilots is rendered ineligible to retain his captain or co-pilot seat because of a medical disability (and consequent failure to meet FAA requirements), or if he loses his position because of reduced flying requirements, he is entitled to exercise his seniority rights to displace a less senior flight

²³ The validity of the FAA Rule is not at issue in this case. See notes 29, 32 & 34, *infra*.

engineer or to be placed on unpaid leave until he accrues sufficient seniority to bid on and secure a position for which he is qualified. Similarly, if any one of TWA's pilots fails training to upgrade to captain or co-pilot, or displays such incompetence as to warrant discipline, that pilot is permanently and automatically downgraded to a position for which he remains qualified. TWA proffered no reason for denying the same treatment to the handful of older pilots,²⁴ similarly disqualified by virtue of the FAA regulation, who each year since 1978 have sought to continue working as flight engineers.²⁵

2. The court of appeals correctly held that this "direct evidence of a differentiation based solely on age" (Pet.

²⁴ Seventy of the three or four hundred captains and first officers who reached age 60 between 1978 and 1981 have sought to continue working beyond that age (C.A. App. 189-190).

²⁵ TWA now suggests (Br. 12-13) that the difference in treatment is attributable to the fact that, while approximately 20 captains each year seek to continue employment as flight engineers after they reach 60, fewer pilots have invoked their contractual rights to move into alternative assignments upon loss of their present positions for non-age reasons. TWA conspicuously omits from this discussion any reference to its liberal transfer policy for pilots who lose their jobs because of operational cutbacks (page 12, *supra*). In any event, because the non-age transfer policies are included in the Working Agreement, TWA has committed itself to permit all younger jobless pilots to remain employed in alternative positions, regardless of the number of pilots involved.

TWA also cites (Br. 17 n.19) the arbitration decision denying respondent Thurston's contractual grievance claim (ALPA Br. in Op. App. B16-B19; C.A. App. 526-532) as evidence that its treatment of the younger pilots does not require it to treat the overage pilots similarly. But the arbitrator simply held that the contractual transfer provisions in the Working Agreement were not directly applicable to Thurston's age-based claim (ALPA Br. in Opp. B16-B18; C.A. App. 530-531). The arbitration decision "emphasized * * * that in deciding this case, the System Board renders no opinion with respect to any legal rights that Captain Thurston might have under the ADEA" (emphasis in original) (ALPA Br. in Opp. B13-B14; C.A. App. 530). Here, of course, those are the only rights in issue—there is no claim that any of the pilots here involved have transfer rights under the express contractual provisions of the Working Agreement.

App. 24) established an un rebutted prima facie case. As in *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), the employer's claim that its practices were not motivated by a discriminatory intent, and thus that it cannot be liable under a discriminatory treatment theory, overlooks the fact that the challenged employment practice was discriminatory on its face. Here, as in *Manhart*, "[s]uch a practice does not pass the simple test of whether 'treatment of a person [is] in a manner which but for that person's [age] would be different'" (435 U.S. at 711). See also *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.), cert. denied, 434 U.S. 966 (1977); *Rodriguez v. Taylor*, 569 F.2d 1231, 1237 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978).

Contrary to TWA's contention (Br. 22-25), *McDonnell Douglas Corp. v. Green*, *supra*, does not require respondent pilots and EEOC to establish a prima facie case by proof that there was a flight engineer vacancy at the time each captain applied. In *McDonnell Douglas*, a refusal to hire case, this Court set forth one mode of making a prima facie showing that the action complained of was based on a discriminatory criterion. See *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253-254 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977). As the court below recognized (Pet. App. A24), however, the *McDonnell Douglas* method of proof is not "an inflexible rule" (*Furnco Construction Corp. v. Waters*, 438 U.S. 567, 575 (1978); *United States Postal Service Board of Governors v. Aikens*, No. 81-1044 (Apr. 4, 1983)); that method of proof was simply designed to assure "the plaintiff his day in court despite the unavailability of direct evidence." *Loeb v. Textron*, 600 F.2d 1003, 1014 (1st Cir. 1979); see *International Brotherhood of Teamsters v. United States*, 431 U.S. at 358 n.44. The court below correctly held that the *McDonnell Douglas* formula is inapposite where, as here, respondents' prima

facie case of discriminatory treatment rests on "direct evidence of a differentiation based solely on age" (Pet. App. A24), i.e., that TWA involuntarily retires and refuses transfers to pilots precisely because they have reached age 60, at the same time that it permits all similarly-situated younger pilots to continue their employment in positions for which they remain qualified. Accord, *Stone v. Western Air Lines, Inc.*, 544 F. Supp. 33, 36-37 (C.D. Cal. 1982), *aff'd sub nom. Criswell v. Western Airlines*, 709 F.2d 544 (9th Cir. 1983), petition for cert. pending, No. 83-1545; *Monroe v. United Airlines*, No. 83-1245 (7th Cir. May 30, 1984), slip op. 14-15.²⁶

3. TWA's argument (Br. 16-20) that the holding below establishes an "extreme standard of liability", mandating "special treatment" or an age-based right to "accommodation" for older pilots, in contravention of the ADEA's legislative history and case law, is equally without merit.

Section 4(a)(1) of the ADEA (29 U.S.C. 623(a)(1)) prohibits age discrimination with respect to the "terms, conditions, or privileges of employment." One "privilege" of a pilot's employment at TWA is the right to remain employed even though disqualified from retaining his current position, and to use his seniority to move into an alternative assignment for which he is qualified. Under the ADEA—like Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e *et seq.*)—a "benefit

²⁶ Petitioner TWA's claim that there were no flight engineer vacancies the plaintiffs could fill simply begs the question. It is age, and not the lack of vacancies, that explains the difference in treatment between plaintiffs and TWA's younger pilots. When the latter need to change their status because they are unable to retain their present positions, they either displace junior pilots, thus creating their own "vacancies", or they wait on leave or furlough status until they can displace a junior pilot. If the same rules had been applied to plaintiffs as to their younger brethren, vacancies would have existed because seniority would determine their right to displace other pilots and they were the most senior pilots employed by TWA.

that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all." *Hishon v. King & Spalding*, No. 82-940 (May 22, 1984), slip op. 5. TWA's policy towards overage pilots violated this basic requirement because, as the court below explained (Pet. App. A31 (footnote omitted)):

TWA routinely accommodates other employees who seek to downgrade to flight engineer for non-age reasons and has failed to come forward with a permissible reason for its refusal to accord the same treatment to age-60 captains and first officers * * *. The sole reason for its discrimination against age-60 captains and first officers is their age; this is prohibited by the ADEA.

That holding, which does no more than reiterate a basic principle of the ADEA, is entirely consistent with legislative intent and prevailing case law. Contrary to TWA's claim (Br. 18-19), the court clearly understood that the ADEA "does not require employers to provide special working conditions for older workers to allow them to remain or be employed" (H.R. Rep. 95-527, 95th Cong., 1st Sess. 12 (1977)), but simply mandates "that an employee's age be treated in a neutral fashion, neither facilitating nor hindering advancement, demotion, or discharge." *Parcinski v. Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982), cert. denied, No. 82-459 (Jan. 10, 1983). Accord, *Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), cert. denied, 445 U.S. 943 (1982); *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958, 960 (8th Cir. 1978). Indeed, in rejecting TWA's argument that a ruling in favor of respondent pilots and EEOC required preferential treatment,²⁷ the court explained (Pet. App. A29-A30):

²⁷ TWA also incorrectly suggests (Br. 20) that EEOC seeks preferential treatment for age 60 captains or first officers. What EEOC will seek on remand is "such * * * equitable relief as may be

[Respondents] merely seek the same treatment accorded all younger captains and first officers who become unable to serve in their former capacities for non-age reasons. There is nothing "special" or "preferential" about equal treatment.

appropriate to effectuate the purposes of [the] Act" (29 U.S.C. 626(b)) which, at a minimum, must permit captains and first officers to retain their positions until age 60 and then treat them like all similarly situated employees no longer able to perform their jobs for reasons other than age—i.e., permit them to transfer to flight engineer positions if they have sufficient seniority to do so, or, if not, to remain on vacation and then leave without pay while accruing sufficient seniority to entitle them to a position (C.A. App. 841-842).

Equally spurious is TWA's claim that because "plaintiffs * * * get the same accommodations for non-age reasons as everyone else," the company has satisfied the ADEA by treating everyone equally (Br. 17). The fact that older pilots may be treated equally in other respects does not excuse the fact that age-60 pilots are the only pilots severed from the work force when they can no longer retain their present positions, nor does it shield TWA from liability for the age-based disparity in treatment between similarly situated pilots. Cf. *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (a company cannot refuse to grant leaves of absence for pregnancy and avoid liability for sex discrimination by asserting that it grants leaves for other disabilities equally to both men and women).

Finally, there is no merit to TWA's claim (Br. 21-22) that it cannot be guilty of age-based discrimination because many older officers were successful in complying with the company's restrictive downbidding procedure. As the court below recognized, "[t]he ADEA, like Title VII, 'does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her [protected class] * * * were hired. * * * Every individual employee is protected against * * * discriminatory treatment'" (Pet. App. A25, quoting *Connecticut v. Teal*, 457 U.S. 440, 455 (1982) (emphasis in original)). In any event, as the court further noted (*ibid.*), TWA's policy exacts a toll even from successful downbidders. These pilots are forced to bid for a vacancy substantially in advance of their 60th birthdays in order to avoid the risk that no vacancy will later be available, and to enter training and fill that vacancy as close as possible to its effective date. The result is that a captain perfectly capable and qualified to retain the position in which he has served the company for years is forced prematurely into the less prestigious and lower paying flight engineer job.

B. TWA's Actions Are Not Covered by the "Bona Fide Seniority System" Exemption in Section 4(f)(2) of the ADEA

The district court held that TWA's actions were lawful under Section 4(f)(2) of the ADEA (29 U.S.C. 623(f)(2)) as taken "to observe the terms of a bona fide seniority system." (Pet. App. A59-A60.) According to the district court, TWA's bidding procedures "follow a seniority system which was instituted for nondiscriminatory reasons and is applied in a neutral manner. * * * [A]ny denial of Flight Engineer status to pilots resulted from the neutral application of this bona fide seniority system and not by discriminatory treatment on the basis of age" (Pet. App. A60). The court of appeals disagreed, and correctly rejected TWA's seniority system defense under Section 4(f)(2) (Pet. App. A25-A26). TWA attempts to revive that defense in its brief on the merits in this Court (Br. 26-30) in the guise of a legitimate, non-discriminatory reason for its actions under *McDonnell Douglas Corp. v. Green*, *supra*.²⁸ But however the argument is presented, TWA's seniority system cannot excuse the discrimination challenged here for two independent reasons: First, the statute, as amended in 1978, expressly excludes involuntary retirement from the types of personnel actions that can be immunized under Section 4(f)(2), and second, the action that injured respondent pilots was not based on TWA's seniority system.

Effective April 6, 1978, Section 4(f)(2) was amended to provide that no bona fide seniority system or benefit plan relied upon to excuse an employer's age-based personnel actions "shall require or permit the involuntary retirement of any [40 to 70 year-old] individual because of * * * age" (29 U.S.C. 623(f)(2)). The involuntary retirements challenged here all occurred after April 1978 (TWA Br. 13, n.16). Thus, even if, as TWA claims,

²⁸ We note that the question whether TWA's seniority system is a viable defense to liability was not presented in the company's petition for certiorari.

they resulted from its compliance with its bona fide seniority system, they would not be protected by Section 4(f)(2).²⁹

In any event, there is nothing in TWA's seniority system that requires that over-age pilots be retired. That system is reflected in the company bidding procedure under which vacancies are awarded on the basis of seniority, determined by the date the pilot was hired by the company. It follows that if over-age captains were permitted freely to bid on flight engineer vacancies as they become available, each would eventually be successful precisely because seniority governs the award of bids. It is undisputed that the plaintiffs, and TWA captains generally, are at or near the top of the seniority list.³⁰ Thus, as the court of appeals observed, respondents "do not challenge the operation of the seniority system, but their summary exclusion from it at age 60" (Pet. App. A25-A26). The action which has injured respondents, and which is being challenged here, is TWA's decision that pilots in captain status when they reach 60 must be severed from employment and thus forfeit their seniority. It is this decision which underlies the company's requirement that a captain approaching age 60, in order to con-

²⁹ TWA attempts to answer this objection by asserting (Br. 28 n.35) that it is the FAA Age 60 Rule, rather than its seniority system, that "require[s] or permit[s]" the involuntary retirement of the over-age pilots. But the FAA Rule no more mandates retirement of these employees than the FAA Rule requiring that captains and co-pilots possess a first-class medical certificate mandates that those unable to maintain such certification be severed from the work force (see page 11, *supra*).

As the FAA has itself pointed out (C.A. App. 547-548): "[the] Age 60 rule does not ground a pilot or totally deny him the right to work as a pilot. He can be employed by an air carrier as a check pilot or flight instructor, provided he is not concurrently serving as a pilot flight crewmember in an operation under Part 121."

³⁰ For example, respondents Clark, Parkhill, and Thurston had 34, 33, and 36 years of seniority, respectively, when they were forced to retire (C.A. App. 919-921, 911-912, 903-905).

tinue working, must be awarded a flight engineer vacancy with an effective date prior to his 60th birthday (page 7, *supra*). This requirement precipitated the involuntary retirement of respondent captains, who failed to satisfy it. And it is this requirement, together with the more recent requirement that successful bidders fulfill their bids "in a timely manner," which has resulted in the constructive demotion of captains approaching 60, inasmuch as TWA typically now sends them through training and into the less prestigious and lower-paying flight engineer positions prior to their 60th birthdays.

TWA's Age 60 Policy cannot be legitimately explained by its seniority system nor defended under Section 4(f)(2) because, as the court below recognized (Pet. App. A26), TWA's decision to retire its captains when they reach 60 "is in no way mandated by the negotiated seniority system." Rather, the seniority provisions of the TWA-ALPA Working Agreement merely state that "[a]ny pilot whose services with the company are permanently severed shall forfeit his seniority rights" (page 8, *supra*). While it is certainly true that a rule governing the circumstances under which an employee's seniority is forfeited may be considered part of a "seniority system" (*California Brewers Association v. Bryant*, 444 U.S. 598 (1980)), nothing in the Working Agreement requires TWA to "permanently sever[]" a pilot's employment simply because he can no longer serve as a captain or first officer.

It is clear that a successful defense of age-based personnel actions under Section 4(f)(2) requires a showing that the employer's action complied with an express provision of the seniority system or benefit plan relied upon. *Sexton v. Beatrice Foods Co.*, 630 F.2d 478, 483-488 (7th Cir. 1980); *EEOC v. Baltimore & O. Ry.*, 632 F.2d 1107, 1111 (4th Cir. 1980), cert. denied, 454 U.S. 825 (1981) ("A successful 4(f)(2) defense [under the pre-Amendment Act (see pages 22-23, *supra*)] requires that the involuntary termination be pursuant to the pension plan's design—not to a discretionary act of management."). Cf.

United Air Lines, Inc. v. McMann, 434 U.S. 192, 196-197 (1977). TWA therefore cannot invoke the seniority system as a "legitimate, non-discriminatory" reason for the forced retirement and refusal to transfer age 60 captains, nor can those actions be defended as having been taken "to observe" the terms of its seniority system.³¹

C. TWA's Actions Are Not Covered by the Bona Fide Occupational Qualification Exemption in Section 4(f)(1) of the ADEA

TWA involuntarily retires 60-year old captains and co-pilots who seek continued employment as flight engineers—a job excluded from the FAA Rule, and for which TWA has never claimed that age 60 is a bona fide occupational qualification (BFOQ) (and, indeed, a job in which TWA employs persons older than 60). At the same time, the company uniformly retains younger pilots when non-age related factors render them incapable of occupying their present positions. In its brief as cross-petitioner (Br. at 4), ALPA attempts to justify this discrimination under Section 4(f)(1) of the ADEA, because age 60

³¹ Petitioner TWA also argues (Br. 19-21, 25 & n.30) that in ruling that its Age 60 policy was prima facie discriminatory, the court below improperly interfered with the company's seniority system and its collective bargaining agreement with ALPA. For the reasons stated in the text, the court's ruling does not implicate, much less denigrate, TWA's seniority system.

Nor does the court's ruling otherwise "ignore[] the need for TWA" to comply both with the ADEA and with "the legitimate considerations of the Working Agreement" (TWA Br. 20-21). The court properly faulted TWA for retiring 60-year-old captains when the Working Agreement provided for the continued employment of all other pilots disqualified from their present positions for non-age related reasons. The Agreement itself reserves to the company the right to keep those captains on the rolls beyond age 60 (pages 6-7, *supra*; see also Pet. App. A50-51; A13-A16). Contrary to TWA's implication, the court did not require the company to deviate from its Working Agreement by giving those captains an unconditional right to "displace" junior flight engineers. Whether that type of movement, rather than bidding for vacancies beyond age 60, should be ordered as "appropriate equitable relief" is a remedial question to be decided on remand (see note 27, *supra*).

is a BFOQ for the captain position.³² This argument, which is supported neither by the text of the ADEA nor its legislative history, was properly rejected by the court below.

1. Section 4(a)(1) of the ADEA (29 U.S.C. 623(a)(1)) prohibits an employer from discharging or otherwise discriminating against any individual on the basis of age. Section 4(f)(1) permits an employer to "take any action otherwise prohibited * * * where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business" (29 U.S.C. 623(f)(1)). Because the BFOQ provision creates an exception to the statute's general prohibition against discrimination based on age, it must be narrowly construed and may be invoked only if an employer proves "plainly and unmistakably" that its employment practice meets the terms and spirit of the provision. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743, 748 (7th Cir. 1983), cert. denied, No. 83-205 (Nov. 28, 1983); *Arritt v. Grisell*, 597 F.2d 1267, 1271 (4th Cir. 1977); *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.), cert. denied, 434 U.S. 966 (1977); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 230 (5th Cir. 1976).

As the court below observed, the "terms of [§ 4(f)(1)] plainly reveal its purpose, which is to excuse only

³² The EEOC has not, in this litigation, challenged the claim that the FAA's Age 60 Rule establishes a BFOQ for captains and first officers of commercial airlines and we do not do so here. Although the EEOC has questioned the justification for such a flat ban on the service of older pilots (see Comments of Constance Dupre, Associate General Counsel, EEOC, published in *Report of the National Institute on Aging Panel on the Experienced Pilots Study C109-C115* (Dep't of Health & Human Services, Bethesda, Md. Aug. 1981)), it is clear that the regulation requires commercial airlines to comply with its terms. It does not, however, establish a BFOQ for flight deck positions not covered by the Rule (*Stone v. Western Air Lines, Inc.*, 544 F. Supp. 33, aff'd sub nom. *Criswell v. Western Airlines*, 709 F.2d 544 (9th Cir. 1983), petition for cert. pending, No. 83-1545).

those age-based actions against employees that are related to the "particular job" (Pet. App. A28). Under the terms of Section 4(f)(1), the company could not, for example, refuse to consider an employment application submitted by a 60-year-old individual for a flight engineer position on the ground that age 60 is a BFOQ for the captain and co-pilot positions. Similarly, it cannot rely on the BFOQ exemption to sever from the work force because of his age a captain who seeks to transfer to a flight engineer vacancy. Section 4(a)(1) requires that the captain, like the applicant, be considered for the flight engineer seat under the same terms as other younger employees seeking transfers. He may not be refused that consideration simply because he is subject to a BFOQ under Section 4(f)(1) for an occupation to which he no longer makes any claim.

ALPA's contrary and utterly novel reading of Section 4(f)(1) rests on the assertion that the section permits an employer to "take any action otherwise prohibited"—and that "any action" must include involuntary retirement (ALPA Br. 15-18). This argument overlooks the fact that "any action" may be taken *only* "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business" (29 U.S.C. 623(f)(1)). That language qualifies and limits the scope of the defense, and precludes its application here. In applying the section, the critical issue is whether the employer's age-based action implements an *occupational* qualification that is *reasonably necessary*; ALPA's construction would allow an age qualification justified in one occupation to be applied to others even "where" the age qualification is not "reasonably necessary" to "the particular business" of the other occupations. This reading ignores the terms and violates the purpose of the section, since it limits employment of older workers without serving any reasonable requirements of the employer.

The court below was thus faithful to the letter and spirit of Section 4(f)(1) in concluding that it does not sanction "an age-based refusal to consider a transfer ap-

plication submitted by a 60-year old downbidding captain, merely because age 60 is a BFOQ for the captain's former job" (Pet. App. A29). The court's holding does not "read a limitation into Section 4(f)(1)" (ALPA Br. 19); it merely applies the limitation inherent in its language: the only age-based actions that can be justified are those "reasonably necessary" to the demands of the job for which age is a BFOQ. Cf. *Tuohy v. Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982).

2. Nothing in the legislative history of the 1978 Amendments to the Act is inconsistent with this interpretation. The amendments were designed to strengthen and extend the ADEA. A primary impetus for the amendments was to overturn this Court's decision in *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977), which construed Section 4(f)(2) of the Act to permit the involuntary retirement of 60-year-old employees pursuant to a bona fide retirement plan that predated the 1967 enactment of the ADEA. The Amendments precluded such forced early retirement, and extended the Act's protections to persons up to age 70. H.R. Conf. Rep. 95-950, 95th Cong., 2d Sess. 8 (1978); H.R. Rep. 95-527, 95th Cong., 1st Sess. 1 (1977). Congress strongly reaffirmed the need "to insure that older individuals who desire to work will not be denied employment opportunities solely on the basis of age" (S. Rep. 95-493, 95th Cong., 1st Sess. 1 (1977)). It would be incongruous in the extreme to conclude—as ALPA urges—that at the same time, Congress authorized the practices challenged here: the forced retirement of employees subject to a BFOQ in their original position, and the refusal to consider them, on the same terms as other employees, for jobs for which they remain qualified.

ALPA relies (Br. 9-10) on the legislative history surrounding a proposed Senate amendment to Section 4(f)(1) that would have added mandatory retirement to actions permitted in reliance on a BFOQ: in particular, ALPA cites the statement of the Conference Committee that the conferees agreed to withdraw the amendment

because it "neither added to nor worked any change upon present law" (H.R. Conf. Rep. 95-950, *supra*, at 7). But that statement sheds no light on what the "present law" requires with respect to age-based disparities in job transfer rights.

Similarly, the passages upon which ALPA relies (Br. 10-11) from the House Committee Report and floor debates referring to "jobs with unusually high demands" and "hazardous occupations" as examples of jobs from which mandatory retirement might be justified under Section 4(f)(1) (H.R. Rep. 95-527, *supra*, at 12; 123 Cong. Rec. 30566 (1977); 123 Cong. Rec. 34296 (1977)) do not support ALPA's interpretation. They simply indicate that nothing in the Act or the proposed Amendments requires an employer either to retain an employee in a position with a BFOQ lower than his age, or to give him special transfer rights not available to other younger employees. But neither these statements, nor the explanation for the withdrawal of the amendments to Section 4(f)(1) discussed above, indicate that Congress ever addressed the practice involved in this case—the discriminatory limitation of the opportunity to transfer from positions subject to a BFOQ to others not so subject. Still less do they indicate that Congress approved of this practice, which is entirely inconsistent with the ADEA's fundamental proscription of discriminatory working conditions (29 U.S.C. 623(a)(1)). Instead, we submit that Congress never specifically addressed the issue, but generally assumed that the BFOQ defense would apply only to actions relating to the particular job to which it applied.³³ As this

³³ The House Report reflects Congress's understanding that Section 4(f)(1) excuses age-based action only when the age qualification is "reasonably necessary to the normal operation of a particular activity * * * . [I]n some jobs with unusually high demands, age may be considered a factor in hiring and retaining workers" (H.R. Rep. 95-527, *supra*, at 12). This language strongly suggests that the BFOQ defense is job specific: that age may not be considered in determining whether to transfer workers to other jobs for which age is not a BFOQ.

Court recently emphasized in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 4-5 (footnotes omitted): "[I]f * * * Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administration interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." As we have shown, the agency answer here is entirely justified by the statute and the policies it is designed to further.³⁴

³⁴ Our construction comports with the government's consistent position on the relationship between the FAA rule and the ADEA's requirements. In a series of opinion letters issued on May 4, 1979, the Department of Labor explained (C.A. App. 971, 869-871):

While the FAA Rule does not permit persons over age 60 to function as pilots in scheduled carrier operations, it does not require compulsory retirement. Thus, pilots approaching age 60 who wish to continue employment in positions which do not fall within the Age 60 rule (such as flight instructor, check pilot, or flight engineer) must be considered for such employment without regard to age on the same basis as other employees or applicants.

* * * * *

In summary, while the ADEA does not require that a carrier provide, in each and every case, an alternative assignment for pilots subject to the FAA's Age 60 Rule, such persons must be considered for reassignment (or training prior to reassignment) to positions not covered by the Rule. Age must not be either a direct or indirect consideration; the 60-year-old pilot must be treated on the same basis as other employees or applicants for employment.

This interpretation remained in effect after the EEOC assumed jurisdiction over the ADEA in July 1979 (see 44 Fed. Reg. 37974 (1979)) and, though technically superseded since the EEOC's promulgation of its own ADEA regulations in 1981 (see 46 Fed. Reg. 47724 (1981)), continues to reflect the Commission's position on this issue.

II. THE COURT BELOW PROPERLY AWARDED LIQUIDATED DAMAGES TO THE PLAINTIFFS

A. A Company That Intentionally Treats Workers Less Favorably Because Of Their Age Is Liable For Liquidated Damages If It Knew Or Should Have Known That Its Actions Were Governed By The ADEA

Section 7(b) of the ADEA provides that the ADEA "shall be enforced in accordance with the powers, remedies and procedures provided in sections 11(b), 16 (except for subsection (a) thereof) and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211 (b), 216, 217)" (Pub. L. No. 90-202, 81 Stat. 604, 29 U.S.C. 626(b)). Sections 16(b) and 16(c) of the FLSA authorize the recovery of back wages and benefits, as well as "an additional equal amount as liquidated damages."³⁵ This provision for liquidated damages is, however, modified by Section 7(b) of the ADEA, which states that such damages are to be awarded "only in cases of willful violations."³⁶

³⁵ TWA incorrectly contends (Br. 37 n.49) that the government cannot recover liquidated damages under the ADEA because Section 16(c) of the FLSA did not authorize such recovery in 1967, when the ADEA was enacted. *Hasset v. Welch*, 303 U.S. 303 (1938), on which TWA relies, refers, in dicta, to the "well settled canon" that where a statute is adopted by reference, the adoption "does not include subsequent additions or modifications of the statute so taken unless it does so by express intent." 303 U.S. at 314. There is such express intent here. The explicit incorporation of the FLSA enforcement mechanisms "as amended" makes clear that the ADEA is to be enforced under the FLSA as it may read thereafter. In addition, Congress was fully aware of the interrelationship of the two Acts when it authorized the government to obtain liquidated damages under Section 16(c) in 1974; the Fair Labor Standards Amendments of 1974 explicitly amended both the FLSA and the ADEA. Pub. L. No. 93-259, §§ 26, 28, 88 Stat. 73, 74; H.R. Rep. 93-913, 93d Cong., 2d Sess. 40 (1974); *EEOC v. Gilbarco, Inc.*, 615 F.2d 985, 989 (4th Cir. 1980).

³⁶ In contrast, Section 11 of the Portal-to-Portal Pay Act of 1947, 29 U.S.C. 260, grants trial courts discretion to deny or reduce liquidated damage awards in FLSA suits under Section 16(c) if

The court below correctly awarded liquidated damages. We submit that where an employer intentionally discriminates on the basis of age, the violation is willful if the employer knew or should have known that its actions were governed by the Act. Because TWA obviously knew that its Age 60 Policy was governed by the ADEA as amended in 1978, it is liable for liquidated damages.

1. The term "willful violations" appears in a similar civil context in Section 6(a) of the Portal-to-Portal Pay Act of 1947, as amended, 29 U.S.C. 255(a), which extends the limitations period from two to three years for "willful violations" of the FLSA. This statute of limitations provision, enacted one year before the ADEA in 1966,³⁷ is specifically incorporated into the ADEA (§ 7(e)(1), 29 U.S.C. 626(e)(1)).

The courts of appeals have uniformly held that Congress used the term "willful violations" in Section 6(a) of the Portal-to-Portal Pay Act to describe situations in which the employer took actions in fact prohibited by the statute and was, or should have been, cognizant of an appreciable possibility that the employees involved were covered by the statutory provisions. *EEOC v. Central Kansas Medical Center*, 705 F.2d 1271, 1274 (10th Cir. 1983); *Marshall v. Erin Food Services, Inc.*, 672 F.2d 229, 230 (1st Cir. 1982); *Marshall v. Union Pac. Motor Freight Co.*, 650 F.2d 1085, 1092-1093 (9th Cir. 1981); *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir.), cert. denied, 409 U.S. 948 (1972); *Donovan v. Carls Drug Co.*, 703 F.2d 650, 652 (2d Cir. 1983); see

the employer establishes a good faith defense to its violations of the wage-hour law. As this Court has noted, "[a]lthough § 7(e) of the ADEA, 29 U.S.C. § 626(e), expressly incorporates §§ 6 and 10 of the Portal-to-Portal Pay Act * * *, the ADEA does not make any reference to § 11, 29 U.S.C. § 260." *Lorillard v. Pons*, 434 U.S. 575, 582 n.8 (1978). Of the eight circuits that have addressed the issue, only the Fifth Circuit has held 29 U.S.C. 260 applicable to ADEA actions. *Rose v. National Cash Register Corp.*, 703 F.2d 225, 228 (6th Cir. 1983) and cases collected therein.

³⁷ Pub. L. No. 89-601, Tit. VI, § 601(b), 80 Stat. 844.

Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1113-1114 (4th Cir. 1981). Cf. *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 461-462 (D.C. Cir. 1976) ("at the very least the employer's noncompliance is willful when he is cognizant of an appreciable possibility that he may be subject to the statutory requirements and fails to take steps reasonably calculated to resolve the doubt").³⁸

Equally well-recognized is the "natural presumption that identical words used in different parts of the same Act are intended to have the same meaning." *Atlantic Cleaners & Dyers v. United States, Inc.*, 286 U.S. 427, 433 (1932). See 2A C. Sands, *Sutherland Statutes and Statutory Construction* § 51.08 & n.6 (4th ed. 1973). Here, the same Congress that added Section 6(a) to the Portal-to-Portal Pay Act in 1966—using the term "willful violations" broadly to describe actions that in fact violate the statute when taken with knowledge of an appreciable possibility that the statute applies—one year later incorporated that provision into the ADEA and at the same time determined that liquidated damages would be available for such "willful violations." There is thus a strong presumption that Congress intended that the term have the same meaning in Section 7(b) as it had in Section 7(e)(1): that liquidated damages should be awarded

³⁸ In addition, the courts have unanimously rejected any specific intent requirement. E.g., *Marshall v. Erin Food Services*, 672 F.2d at 231 ("[n]either bad faith nor knowledge that a particular practice violates the Act is required"); *Marshall v. Union Pac. Motor Freight Co.*, 650 F.2d at 1092-1093 ("Reliance on erroneous advice is no bar to a finding of a 'willful' violation, except for a good faith reliance upon advice rendered by an appropriate government agency."); *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d at 1141-1142 (reliance on counsel's advice no defense); *Laffey v. Northwest Airlines*, 567 F.2d 429, 461-462 (D.C. Cir. 1976) (employer's noncompliance is willful when he "consciously and voluntarily charts a course which turns out to be wrong"); *Donovan v. Carls Drug Co.*, 703 F.2d at 652 ("neither a good faith belief in the lawfulness of his * * * regulations nor complete ignorance of their invalidity shield the employer"); see *Spagnuolo v. Whirlpool Corp.*, 641 F.2d at 1113-1114 (employer's good faith belief in the lawfulness of his policies is no defense).

upon a showing that the employer knew the ADEA governed its actions. Contrary to the claim of TWA (Br. 33-35) and its amici (Equal Employment Advisory Council (Br. 8-22); United States Chamber of Commerce (Br. 6-10)), nothing in the legislative history of the ADEA's liquidated damages provision defeats this presumption, or suggests that it was to apply only when the employer intended to violate the Act. Such a specific intent requirement is inconsistent with court of appeals decisions interpreting Section 7(b).

2. Section 7(b)'s provision for liquidated damages derived from an amendment proposed by Senator Javits to the Administration's age discrimination bill. S. 830 and H.R. 3651, 90th Cong., 1st Sess. (1977); 113 Cong. Rec. 2794-2796 (1967). As introduced, the bill would have imposed criminal penalties for willful violations (*id.* § 11(b), 113 Cong. Rec. 2795). Senator Javits' substitute bill replaced this criminal provision with the civil remedy of liquidated damages (113 Cong. Rec. 7077 (1967) (Amendment No. 125); S. 830, 90th Cong., 1st Sess. § 7(b) (1967) as reported from the Senate Committee on Labor and Public Welfare. 113 Cong. Rec. 31248 (1967)).

The change from criminal to civil penalties was designed to facilitate enforcement by avoiding "difficult problems of proof which would arise under a criminal provision,"³⁹ and the possible invocation of Fifth Amendment protection that could impede investigation, conciliation, and enforcement (113 Cong. Rec. 7076 (1967) (remarks of Sen. Javits); see also *Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 27 (1967) (*Senate*

³⁹ Although a criminal sanction can be imposed only after guilt is established by proof beyond a reasonable doubt (*In re Winship*, 397 U.S. 358 (1970)), civil damages may be assessed if a violation is shown by a preponderance of the evidence (see, e.g., *Strachan Shipping Co. v. Shea*, 406 F.2d 521, 522 (5th Cir.), cert. denied, 395 U.S. 921 (1969)).

Hearings)).⁴⁰ The change was thus designed to broaden, not to narrow, the applicability of the liquidated damages provision, to assure that it would "furnish an effective deterrent to willful violations" (113 Cong. Rec. 7076 (1967) (remarks of Sen. Javits)).

This purpose would not be achieved by limiting the recovery of liquidated damages to those situations in which the employer can be shown to have intended to violate the Act. The discrimination that Congress sought to deter was generally understood to result not from malice or intolerance, but from unfounded assumptions and ignorance regarding the abilities of older workers. *Age Discrimination in Employment, Hearings on H.R. 3651, et al., Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 90th Cong., 1st Sess., 6, 8, 13 (1967) (*House Hearings*).⁴¹ To serve as an

⁴⁰ Sen. Javits (*id.* at 27) there testified that "there is no use giving people the argument that it has criminal sanctions as a reason for refusing to cooperate or testify in investigations or proceedings."

⁴¹ See also U.S. Department of Labor, *The Older American Worker; Age Discrimination in Employment, A Report of the Secretary of Labor to the Congress under Section 715 of the Civil Rights Act of 1964*, at 2, 3 (1965) ("discrimination in the non-employment of older workers involves their rejection because of assumptions about the effect of age on their ability to do a job when there is in fact no basis for these assumptions * * *. The discrimination older workers have most to fear * * * is not from any employer malice"); 113 Cong. Rec. 31254 (1967) (Sen. Javits) ("What we have learned, essentially, is that a great deal of the problem stems from pure ignorance; there is simply the widespread irrational belief that once men and women are past a certain age they are no longer capable."); *id.* at 31256 (Sen. Young) ("Medical science and other factors have vastly increased * * * life expectancy. * * * [The] view of 65 being the proper age for retirement * * * [is] outdated and outmoded."); *id.* at 34740 (Rep. Perkins) (statute addresses "long-standing misconception about the employability of older workers and certain economic factors"); *id.* at 34742 (Rep. Burke) ("Age discrimination is not the same as the insidious discrimination based on race or creed prejudices and bigotry. These result * * * [from] feelings about a person en-

effective deterrent to discrimination that Congress understood to be more thoughtless than malicious, liquidated damages must be available on a basis that will prompt "employers everywhere * * * [to] take a look at their * * * policies" (113 Cong. Rec. 31257 (1967) (Sen. Young)), and "bring about a basic change in public attitude toward the value of the older worker." *Id.* at 34744 (Rep. Hawkins). Defining a violation as "willful" whenever the employer intentionally discriminates on the basis of age and is, or should have been, aware of the applicability of the ADEA properly promotes this deterrent purpose.

TWA (Br. 34) and amici (EEAC Br. 11-12; Ch. Com. Br. 8) argue that the ADEA liquidated damages provision is punitive, and so should be available only when the employer can be shown to have intentionally violated the Act.⁴² But the legislative history of the liquidated damages provision in the ADEA—as in the FLSA—shows that such damages are designed to provide full compensation to the employee, rather than primarily to punish the employer. Thus, Congress focused on the need to be fair to the *employee*, and to provide him full compensation for

tirely unrelated to his ability to do a job. This is hardly a problem for the older jobseeker. Discrimination arises for him because of assumptions that are made about the effects of age on performance.").

⁴² Their related argument (TWA Br. 31-33; EEAC Br. 8, 22; Ch. Com. Br. 7-8)—that the imposition of liquidated damages whenever there is a finding of discriminatory treatment with knowledge of the applicability of the Act leaves the "willfulness" limitation out of the Act—has no more merit here than it does in the Portal-to-Portal Act context. There, the courts have consistently rejected the argument, recognizing that the only employers who can claim not to have acted willfully are those "who were unwittingly intercepted by the [newly expanded] Act" (*Laffey v. Northwest Airlines, Inc.*, 567 F.2d at 461; see cases cited, page 32, *supra*). In addition, it may well be that where an employee has shown that facially neutral employer practices have a discriminatory impact, the court might conclude that the employer had no reason to be aware of the applicability of the ADEA to those practices. In that case, liquidated damages would not be available.

nonpecuniary damages not readily calculable, including emotional injuries such as humiliation and loss of self respect. H.R. Conf. Rep. 95-950, 95th Cong., 2d Sess. 14 (1978); cf. D. Dobbs, *Handbook on the Law of Remedies* 135-136 (1973); *Kolb v. Goldring*, 694 F.2d 869, 872 n.2 (1st Cir. 1982); *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1102 (8th Cir. 1982). The legislative purpose would be defeated if the mere fact that an employer had an arguable legal position were held to preclude application of the liquidated damages provision to its deliberate age-based disparate treatment of employees covered by the Act.

Even if the legislative history were less explicit, liquidated damages under the ADEA should be deemed to serve the same compensatory purpose this Court recognized in the FLSA provisions from which they were taken (*Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 583 (1942)).⁴³ As the Court noted in *Lorillard v. Pons*, 434 U.S. at 581:

[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretations given to the incorporated law, at least insofar as it affects the new statute.

That presumption is particularly appropriate here since, in enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretations and a willingness to

⁴³ This purpose was not altered by Congress's later enactment of Section 11 of the Portal-to-Portal Pay Act, 29 U.S.C. 260, which eliminated the mandatory nature of the award and gave trial courts discretion to deny or limit liquidated damages where an employer shows that it acted in good faith. See H.R. Rep. 71, 80th Cong., 1st Sess. 3, 8 (1947); *Thompson v. Sawyer*, 678 F.2d 257, 281 (D.C. Cir. 1982) ("Nothing in the statutory history of the Portal Pay Act suggests that Congress was dissatisfied with the determination that liquidated damages were compensatory. * * * Allow[ing] courts to balance compensating employees against imposing costs on employers hardly transforms the award to a penalty." (citations and footnote omitted)).

depart from those provisions regarded as undesirable or inappropriate for incorporation.

The fact that Congress changed the automatic liquidated damages provision in the FLSA to one providing liquidated damages for willful violations does not imply either that liquidated damages were not to be considered compensatory, or that the words used were to have a different meaning in the new context. Instead, Congress simply concluded that the narrow class of employers who were not "willful" violators under Section 6(a) of the Portal-to-Portal Act should also be excused from providing full compensation to employees injured by actions taken without any consciousness that they might violate the ADEA.⁴⁴

3. Several courts of appeals have recognized that the history and statutory context of Section 7(b)—against which its use of the term "willful violations" must be construed (*Spies v. United States*, 317 U.S. 492, 497 (1943); *United States v. Bishop*, 412 U.S. 346, 356 (1973))—fully support the presumption that Congress meant, by requiring liquidated damages for "willful vio-

⁴⁴ The legislative history of Section 7(b), read against the law under Section 16(a) of the FLSA, also supports the standard urged here. Under Section 16(a)—which Congress chose not to incorporate into the ADEA—criminal penalties attach for willful violations of the wage-hour law. At the time Congress was enacting the ADEA, the courts had held consistently that this provision did not require that the offense "be committed malevolently, with a bad purpose or an evil mind"; rather, "[i]t is sufficient if the act was deliberate, voluntary and intentional as distinguished from one committed through inadvertence, accidentally or by ordinary negligence." *Nabob Oil Co. v. United States*, 190 F.2d 478, 480 (10th Cir.), cert. denied, 342 U.S. 876 (1951); accord, *Hertz Drivursself Stations v. United States*, 150 F.2d 923, 928-929 (8th Cir. 1945); *United States v. Fidanian*, 465 F.2d 755, 760 (5th Cir. 1972). Inasmuch as Congress substituted the ADEA's civil remedy of liquidated damages for criminal penalties in order to avoid proof problems (see p. 34, *supra*), Congress could not have intended a more rigorous standard of proof for liquidated damages than for criminal violations of the FLSA.

lations" in Section 7(b), to cover precisely the same "willful violations" it made subject to the longer statute of limitations in 7(e): intentionally discriminatory acts committed with actual or constructive knowledge that the ADEA applied.⁴⁵ The Fourth, Fifth, and Tenth Circuits have accordingly applied the statute of limitations standard in the liquidated damages context. *Crosland v. Charlotte Eye, Ear & Throat Hospital*, 686 F.2d 208, 217 (4th Cir. 1982); *Hedrick v. Hercules*, 658 F.2d 1088, 1096 (5th Cir. 1981); *Mistretta v. Sandia Corp.*, 639 F.2d 588, 595 (10th Cir. 1980). See also *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1184-1185 (6th Cir. 1983) (crucial question is "whether the employer deliberately, intentionally, and knowingly discharged the employee because of his age"); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 980 (9th Cir. 1981) (same, *semble*).

Conversely, the "specific intent" standard urged by TWA and its amici has been roundly rejected. Of the nine courts of appeals that have addressed the question, all but one have agreed that proof of specific intent to violate the ADEA is not a precondition to an award of liquidated damages. *Blackwell v. Sun Electric Corp.*, 696 F.2d at 1184-1185; *Syvock v. Milwaukee Boiler Manufacturing Co.*, 665 F.2d 149, 155-156 (7th Cir. 1981); *Hedrick v. Hercules*, 658 F.2d at 1096; *Spagnuolo v. Whirlpool Corp.*, 641 F.2d at 1114; *Kelly v. American Standard, Inc.*, 640 F.2d at 980; *Mistretta v. Sandia Corp.*, 639 F.2d at 595; *Wehr v. Burroughs Corp.*, 619 F.2d 276, 283 (1980); *Goodman v. Heublein, Inc.*, 645

⁴⁵ Although one court has refused to require any proof regarding the defendant's state of mind towards the statute for fear of "encouraging employers to know as little as possible about the ADEA" (*Kelly v. American Standard, Inc.*, 640 F.2d 974, 980 (9th Cir. 1981); cf. *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1184 (6th Cir. 1983)), only in the rarest cases will employers be deemed to be reasonably unaware of the ADEA. As the court below noted (Pet. App. A34), the Act itself requires employers to post notices of its applicability. 29 U.S.C. 627.

F.2d 127 (2d Cir. 1981), but see *Loeb v. Textron*, 600 F.2d 1003, 1020 n.27 (1st Cir. 1979) (dicta).⁴⁶

B. The Undisputed Facts Of This Case Compel The Conclusion That TWA's Violation Was Willful

The undisputed evidence compels the conclusion that TWA's ADEA violation was "willful" under the definition of that term that Congress clearly intended. Accordingly, the court below properly awarded liquidated

⁴⁶ Contrary to TWA's assertion (Br. 31-32), the First Circuit in *Loeb v. Textron*, *supra*, which was decided before any court of appeals had considered the issue, did not purport to decide under what circumstances an employer's ADEA violation would be deemed willful. The *Loeb* footnote merely quotes the definition of willfulness from jury instructions concerning mens rea in a criminal context (1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 14.06, at 384 (3d ed. 1977) which, we submit, is inapposite in civil cases.

Nor does the Seventh Circuit require specific intent (TWA Br. 31-32). That the Seventh Circuit was not setting forth a specific intent requirement in *Syvock v. Milwaukee Boiler Manufacturing Co.*, *supra*, is evidenced by its statement that a violation is willful if the employer's "actions were knowing and voluntary and * * * he knew or reasonably should have known that those actions violated the ADEA" (665 F.2d at 156 (emphasis supplied)) and its statement that the test it had articulated "is consistent with the standard endorsed in * * * *Goodman v. Heublein*" (*id.* at 155 n.9). Any contrary implication was dispelled by the subsequent affirmance of a finding of willfulness that explicitly comported with the Third Circuit's *Wehr* standard, which expressly excludes a showing of specific intent. *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743 (1983), cert. denied, No. 83-205 (Nov. 28, 1983).

Similarly, *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161 (S.D.N.Y. 1983), and *Whittlesey v. Union Carbide Corp.*, 567 F. Supp. 1320 (S.D. N.Y. 1983), also recognize that constructive knowledge of or disregard for the proscriptions of the ADEA will justify liquidated damages. See *Koyen*, 560 F. Supp. at 1166 (approving liquidated damages where "the defendant deliberately, intentionally and knowingly discharged plaintiff because of his age, and * * * knew or should have known such conduct was unlawful") (emphasis supplied); *Whittlesey*, 567 F. Supp. at 1330 (agreeing that *Koyen* required a showing that the employer acted with knowledge of the illegality of his action or "at least an inexcusable disregard").

damages at this stage of the case. See *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982). TWA knew that its Age 60 Policy for the continued employment of all flight deck crew members was governed by the ADEA; indeed, that policy was promulgated in direct response to the 1978 Amendments (Pet. App. A4, A8-A9; pages 4-10, *supra*). Moreover, as we have shown (pages 15-21, *supra*), the policy on its face discriminates against pilots covered by the Act on the basis of their age; it is a policy of explicit age-based disparate treatment.

While the foregoing is sufficient to satisfy the Act's standards in our view, here, as the court below concluded (Pet. App. A33-A34), the evidence also shows that the employer acted with "reckless disregard" for whether his actions violated the ADEA. Specifically, the evidence summarized above shows that the policy originally developed by the responsible TWA official imposed no improper restrictions on the transferring pilots. When that official became incapacitated, his successor, acting on his own personal aversion to the continued service beyond age 60 of pilots in any cockpit position, imposed restrictions on transfers of over age captains without regard to the requirements of the ADEA (pages 4-6, *supra*).

III. A UNION THAT VIOLATES THE ADEA IS LIABLE FOR MONETARY RELIEF

Section 4(c) (3) of the ADEA makes it unlawful for a union "to cause or attempt to cause an employer to discriminate" against a worker protected by the Act. The court below concluded that "ALPA actively campaigned to persuade TWA to retain its age 60 retirement policy for all flight deck positions, opposed TWA's unilateral action in August 1978 to attempt partial compliance with the ADEA" and, subsequent to the 1978 ADEA amendments, "negotiated, signed, and administered a Working Agreement * * * requiring retirement of all flight deck personnel at 60" (Pet. App. A32-A33).⁴⁷

⁴⁷ As the court below correctly held (Pet. App. A32), ALPA is independently liable as a signatory to the Working Agreement in

ALPA does not here contest this conclusion.⁴⁸ Based on this finding of culpability, the court originally concluded that "appellants are entitled to recover back pay * * * against the union" (Pet. App. A34). In response to ALPA's petition for rehearing, however, the court amended its decision to absolve ALPA of any monetary liability, holding that the ADEA does not provide for monetary relief against a union (Pet. App. A37-A39). Relying on *Neuman v. Northwest Airlines, Inc.*, 28 Fair Empl. Prac. Cas. (BNA) 1488 (N.D. Ill. 1982), and *Brennan v. Emerald Renovators, Inc.*, 410 F. Supp. 1057 (S.D.N.Y. 1975), the court reasoned that because unions cannot be sued under Section 16(b) of the FLSA (29 U.S.C. 216(b)), and because Section 16(b) is incorporated into the ADEA, unions cannot be liable for back pay or other monetary relief under the ADEA (Pet. App. A37-A39).

This reasoning ignores the fact that, in addition to Section 16(b) of the FLSA, the ADEA includes three other sources of enforcement authority. The text of these provisions, as well as the legislative history and policies of the ADEA, make clear that unions may be required to

effect after the 1978 ADEA amendments, which violated the amended Act by providing for involuntary retirement of pilots at age 60. Cf. *Patterson v. American Tobacco*, 535 F.2d 257, 270 (4th Cir.), cert. denied, 429 U.S. 920 (1976) (Title VII); *Taylor v. Armco Steel Corp.*, 373 F. Supp. 885 (S.D. Tex. 1973) (same); Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702, 704-705 (1980).

In addition, it is undisputed that ALPA "attempt[ed] to cause" TWA to discriminate against over-age-60 pilots, in violation of Section 4(c), by proposing that TWA furlough over-age-60 flight engineers before other flight engineers, regardless of company seniority, and that over-age-60 flight engineers be assigned a new seniority date corresponding to the date on which they qualify as flight engineers, thus making them most susceptible to lay-off (note 17, *supra*).

⁴⁸ ALPA does argue that TWA's actions did not constitute a violation of the ADEA, but it does not pursue the argument made below that the record does not establish the Union's participation in those actions. There is, accordingly, no need for this Court to address that purely factual question.

provide monetary relief to the victims of their discrimination.

A. The Text and The Legislative History of the Act Support the Award of Monetary Relief Against ALPA

Section 7(b) of the ADEA (29 U.S.C. 626(b)) provides that the Act "shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of [the Fair Labor Standards Act], * * * and subsection (c) of this section [29 U.S.C. 626(c)]." Section 16(b) of the FLSA, 29 U.S.C. 216(b), authorizes employees to sue their employer for back pay and liquidated damages. Section 16(c) of the FLSA authorizes government suits for pay and damages; it contains no language providing that only employers may be so sued. Section 17 of the FLSA, 29 U.S.C. 217, grants equitable jurisdiction to the district courts to enjoin violations, and to order payment of back pay. Again, this Section contains no limitation to suits against employers. While the government alone can initiate Section 17 suits under the FLSA (§ 11(a) of the FLSA, 29 U.S.C. 211(a)), this limitation does not apply to the ADEA, because the limiting language of Section 11(a) of the FLSA is not incorporated into the ADEA. Moreover, Section 7(b) of the ADEA specifically authorizes "such [legal and equitable] relief [as may be appropriate] '[i]n any action brought to enforce th[e] Act'." See *Lorillard v. Pons*, 434 U.S. at 581.

Finally, Section 7(c)(1) of the ADEA independently authorizes "[a]ny person aggrieved [to] bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of the Act" (29 U.S.C. 626(c)(1)). This section contains no language suggesting that unions may not be sued. Indeed, in striking contrast to Section 16(b) of the FLSA, it refers to "any person aggrieved", rather than to "one or more employees" in describing who is entitled to sue.

Thus, the enforcement provisions of the FLSA, as modified and incorporated into the ADEA by Section 7(b) of that Act, permit a private plaintiff to sue an employer for pay and liquidated damages (FLSA § 16(b)) or any violator—including a union—for injunctive relief (FLSA § 17), which includes back pay. The government may sue any violator for pay and damages (FLSA § 16(c)) or for injunctive relief (FLSA § 17). Finally, Section 7(c)(1) of the ADEA, by expressly permitting a separate private cause of action to provide “such legal or equitable relief as will effectuate the purposes of the Act”, eliminates any possible discrepancy between the substantive provisions of Section 4, which apply to unions and employment agencies as well as employers, and the enforcement provisions of Section 7: private plaintiffs may obtain liquidated damages as well as pay from any violator, including employers, unions or employment agencies.

2. The legislative history strongly supports this reading of the statute. As this Court has recognized, the ADEA was a “hybrid” of several approaches. *Lorillard v. Pons*, 434 U.S. at 578. The original administration bill contained the same substantive prohibitions as the resulting statute, but the enforcement provisions were modeled after Section 10 of the National Labor Relations Act (29 U.S.C. 160), and provided for administrative enforcement by the Secretary of Labor. S. 830, *supra*, §§ 4, 7; 113 Cong. Rec. 2794-2795 (1967). Labor unions were clearly answerable for money damages, since the Secretary’s authority to order back pay ran against “any person [who] has engaged in an unlawful practice” (S. 830, *supra*, § 7; 113 Cong. Rec. 2795 (1967)).

Opposition to this enforcement scheme came primarily from business groups, not unions.⁴⁹ The AFL-CIO did

⁴⁹ The employer associations recommended enforcement modeled after the FLSA because they preferred the neutral adjudication of the federal district courts, because Wage and Hour personnel were readily available, and because the procedures were familiar. See *Senate Hearings* 113 (Chamber of Commerce); *id.* at 256 (American Retail Association of America); *id.* at 256 (American Retail

object to any union liability under the ADEA, and accordingly proposed the deletion of Section 4(c) of the administration bill, which outlawed discriminatory labor union practices. Testimony of Andrew J. Biemiller, AFL-CIO Legislative Director, *Senate Hearings* 97; Amendment to Exclude Labor Organizations, *id.* at 100.⁵⁰ But, when asked about enforcement procedures, the union representative testified that the choice between the NLRA model—under which unions were unquestionably liable for back pay—and that of the FLSA was not “of critical importance” to the AFL-CIO (Testimony of Kenneth Meiklejohn, *House Hearings* 421). Labor Secretary Wirtz agreed that the differences between the two enforcement schemes were “not basic” and were “more in detail than in the larger effect” (*House Hearings* 13).

The Senate Committee Report provides additional evidence that Congress did not intend to excuse unions from the payment of money judgments. Section 7(e) of the ADEA (29 U.S.C. 626(e)) incorporates by reference Section 10 of the Portal-to-Portal Pay Act of 1947 (29 U.S.C. 259), which provides a defense for the failure to “pay minimum wages or overtime compensation” under the FLSA where the employer proves good faith reliance on an administrative interpretation of the law. While Section 10 by its terms allows only employers to invoke the defense, the Senate Report explicitly states that “[u]nder section 10 of the Portal-to-Portal Pay Act any employer, employment agency, or labor organization that relies in good faith upon written administrative regulations . . . has a valid defense” (emphasis added). S. Rep. 90-723, 90th Cong., 1st Sess. 10 (1967).

Federation); *id.* at 324 (National Association of Manufacturers); *id.* at 396 (National Retail Merchants Association); *House Hearings* 67 (Chamber of Commerce); *id.* at 141 (American Retail Federation). None of these employer representatives suggested that labor unions should be exempted, or that the proposed amendments would have that effect.

⁵⁰ Congress subsequently enacted that section verbatim as Section 4(c) of the ADEA (29 U.S.C. 623(c)).

The purpose of Section 10 of the Portal-to-Portal Act is to give protection from money judgments (see Section 2 of the Act, 29 U.S.C. 251); the defense does not affect prospective injunctive actions. *Western Union Telephone Co. v. McComb*, 165 F.2d 65, 73 (6th Cir. 1947), cert. denied, 333 U.S. 862 (1948). The statement of the Senate Committee, therefore, is further indication that Congress intended to expose unions to monetary liability for violating the ADEA; if this were not the case, the Senate Committee senselessly extended to unions a defense to claims for which they would not, in any event, be liable.

B. The Policies Of The Act Support Union Liability

A comparison of the underlying purposes of the FLSA and the ADEA further supports the conclusion that there was no intent to limit the monetary liability of unions under the ADEA. The enforcement scheme of the FLSA is designed to deprive employers of the economic benefits they derive from paying substandard wages, and to protect the competitive positions of employers who do comply with the Act. 29 U.S.C. 202(a)(3); *United States v. Darby*, 312 U.S. 100, 115 (1941). It is therefore arguable that if unions were held liable for monetary damages under the FLSA, offending employers might be enabled to defeat this statutory purpose by retaining, in whole or part, the fruits of their illegality.⁵¹ There is no comparable countervailing consideration in the statutory goals of the ADEA, since the employer gains no economic benefit from its own or the union's discrimination against older workers. Indeed, in enacting the ADEA, Congress emphasized that older workers are valuable employees, and that discrimination against them is often based on ignorance concerning their true capabilities (see pages 35-36, *supra*).⁵²

⁵¹ See discussion in our Brief at 18-23 in *Northwest Airlines, Inc. v. Transportation Workers of America*, No. 79-1056.

⁵² *Neuman v. Northwest Airlines*, *supra*, relied upon by the court below, therefore wrongly decided that because employees cannot sue

Moreover, the broad purpose of the ADEA, like Title VII, is prophylactic as well as remedial. Cf. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-418 (1975). The

unions for damages under the FLSA, unions are also immune from money judgments under the ADEA. Union liability under the FLSA is simply not determinative under the different legislative scheme and policy of the ADEA. The only other courts that have addressed the issue have held that non-employer defendants which have violated the ADEA are liable for monetary relief, based on the Act's specific grant of jurisdiction to award whatever relief is necessary to effectuate its purposes. *EEOC v. ALPA*, 489 F. Supp. 1003, 1009 (D. Minn. 1980), rev'd on other grounds, 661 F.2d 90 (8th Cir. 1981) (union liability); *Brennan v. Hughes Personnel, Inc.*, 8 Empl. Prac. Dec. (CCH) ¶ 9571 (W.D. Ky. 1974) (employment agency liability).

Brennan v. Emerald Renovators, Inc., 410 F. Supp. 1057 (S.D. N.Y. 1975), also cited by the court below, is inapposite. That case dealt with the Equal Pay Act of 1963 (EPA) (29 U.S.C. 206(d)), not the ADEA, and there are substantial differences between the two statutes; the EPA is an amendment to the FLSA and the ADEA is not (*Lorillard v. Pons*, 434 U.S. at 578), and unlike the ADEA, the EPA is based on a theory of unjust employer benefit through substandard wages. In any event, *Emerald Renovators* recognized the possibility of back pay liability as an equitable remedy under Section 17 of the FLSA, citing *Hodgson v. Sagner, Inc.*, 326 F. Supp. 371 (D. Md. 1971), aff'd *sub nom. Hodgson v. Baltimore Regional Joint Board*, 462 F.2d 180 (4th Cir. 1972). *Sagner* held that unions are subject to back pay liability as an equitable remedy when they violate Section 6(d)(2) of the EPA (29 U.S.C. 206(d)(2)). 326 F. Supp. at 373.

The reasons relied on in *Emerald Renovators, Inc.*, to limit union liability under the EPA are not applicable here. First, the court pointed to the language of Section 16(b) of the FLSA granting employees the right to sue their employers. 410 F. Supp. at 1059 n.5. Under the enforcement scheme of the ADEA however, this limiting language is not controlling: as we have shown, Section 7(c) of the Act, and Sections 16(c) and 17 of the FLSA as incorporated, are not limited to actions against employers. *Emerald Renovators* also reasoned that because Sections 16 and 17 of the FLSA refer to wages "unpaid" or "withheld," only employers can be made liable since it is only employers that can fail to pay or withhold wages. 410 F. Supp. at 1062. Whatever the merits of this argument as applied to FLSA or EPA suits, it is unavailing in the ADEA context. Section 7(b) of the ADEA (29 U.S.C. 626(b)) refers more generally to "[a]mounts owing to a person as a result

Act's declaration of policy itself states that it is designed "to promote employment of older persons based on their ability rather than age [as well as] to prohibit arbitrary age discrimination in employment" (29 U.S.C. 621(b)).

As this Court recognized in *Albemarle Paper Co.*, *supra*, the threat of financial liability is essential to fulfilling a prophylactic purpose, because it is the prospect of a monetary award "that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges [of discrimination].'" 422 U.S. at 417-418. See *Owen v. City of Independence*, 445 U.S. 622, 651-652 (1980).

Thus, although holding employers monetarily liable may ordinarily be sufficient to fulfill the remedial purpose of the ADEA,⁵³ exposing unions also to such liability significantly furthers the prophylactic purpose of the statute. The broad prohibitions against union discrimination contained in Section 4(c), (d) and (e) of the Act (29 U.S.C. 623(c), (d) and (e)) are clear evidence of Congress's understanding that labor organizations can play a major role in promoting and maintaining age bias in the work place. Unions will have little incentive to shun such practices unless they are held responsible, along with employers, for the economic injury suffered by the victims of their discrimination.

of a violation of this Act" and provides that such amounts "shall be deemed" to be unpaid minimum wages or overtime compensation. Thus, once a violation has been shown, the harm which the violator has caused becomes an amount owing; this amount is then to be treated as if it were unpaid minimum wages or overtime compensation for purposes of collection. Where, as here, the union and the employer have violated the Act, creating amounts owed to victims of discrimination, both defendants may be held liable for these amounts.

⁵³ It might not be sufficient in a case involving a union violation of 29 U.S.C. 623(c)(2) by discrimination in the referral of its members for employment. If the employer were not implicated in the violation, the victim's only recourse would be recovery of damages against the union.

CONCLUSION

The judgment of the court of appeals holding that TWA and ALPA violated the ADEA in involuntarily retiring pilots and first officers when they reach 60, and that TWA is liable for liquidated damages, should be affirmed. The judgment that ALPA is not liable for damages should be reversed.

Respectfully submitted.

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JULY 1984

APPENDIX

In addition to the provisions of the Age Discrimination in Employment Act of 1967 (ADEA), as amended (29 U.S.C. 621 *et seq.*) and the Federal Aviation Administration's Regulation set forth at Pet. 2-5, the following statutory provisions are also relevant:

Section 7(c) (1) of the ADEA (29 U.S.C. 626(c) (1)):

Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Commission to enforce the right of such employee under this chapter.

Section 7(e) (1) of the ADEA (29 U.S.C. 626(e) (1)):

Sections 6 and 10 of the Portal-to-Portal Act of 1947 shall apply to actions under this Act.

Section 16(b) and (c) of the Fair Labor Standards Act of 1938 (FLSA), as amended (29 U.S.C. 216(b) and (c)), provide in pertinent part:

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a) (3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a) (3), including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against

any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. * * *

(c) The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of the unpaid minimum wages or overtime compensation and an equal amount of liquidated damages. The right provided by subsection (b) to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in any action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary.

Section 17 of the FLSA (29 U.S.C. 217) provides:

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction for cause

shown to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of the Portal-to-Portal Pay Act of 1947).

Section 6(a) of the Portal-to-Portal Pay Act of 1947, as amended (29 U.S.C. 255(a)) provides in pertinent part:

Any action commenced on or after May 14, 1947 to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

(a) if the cause of action accrues on or after the May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

Section 10(a) of the Portal-to-Portal Pay Act of 1947 (29 U.S.C. 259(a)) provides in relevant part:

In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in re-

liance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged.

Section 11 of the Portal-to-Portal Pay Act (29 U.S.C. 260) provides:

In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

JUL 6 1984

Nos. 83-997, 83-1325

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,
Petitioner,
v.

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PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COM-
MISSION AND AIR LINE PILOTS ASSOCIATION, INTERNA-
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Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
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MISSION AND TRANS WORLD AIRLINES, INC.,
Respondents.

On Writs of Certiorari to the United States
Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE A BRIEF
AS AMICUS CURIAE AND BRIEF FOR THE
AMERICAN FEDERATION OF LABOR AND CONGRESS
OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE
IN SUPPORT OF RESPONDENT
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
IN NO. 83-997

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IN SUPPORT OF RESPONDENT
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
IN NO. 83-997

The American Federation of Labor and Congress of Industrial Organization (AFL-CIO) respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of the position of respondent Air Line Pilots Association, International, in No. 83-997. Counsel for Messrs. Thurston, Clark and Parkhill has declined to consent to the filing of that brief.

The AFL-CIO is a federation of 95 national and international unions having a total membership of approximately 13,500,000 working men and women. The AFL-CIO submits this brief solely to address the issue whether unions may be held liable for monetary relief under the Age Discrimination in Employment Act, a question of obvious importance to the affiliated unions of the AFL-CIO and their members.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-997, 83-1325

TRANS WORLD AIRLINES, INC.,
Petitioner,
v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A.
PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COM-
MISSION AND AIR LINE PILOTS ASSOCIATION, INTERNA-
TIONAL,
Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,
v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A.
PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COM-
MISSION AND TRANS WORLD AIRLINES, INC.,
Respondents.

On Writs of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE IN SUPPORT OF RESPONDENT
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
IN NO. 83-997

SUMMARY OF ARGUMENT

1. Section 7(b) of the Age Discrimination in Employment Act ("ADEA") requires that all "amounts owing" under that Act be treated for purposes of remedy as unpaid minimum wages or overtime compensation under §§ 16 and 17 of the Fair Labor Standards Act ("FLSA").

2. Sections 16 and 17 of the FLSA provide in turn that in an action for unpaid minimum wages or overtime compensation it is the wronged employee's *employer* who is solely liable for a monetary award. That the employer is the sole source for an award of monetary relief in such FLSA actions is not happenstance but rather a direct expression of the point of the Act as a whole. As the legislative history of the FLSA shows, Congress was concerned that employers who pay employees less than the minimum wage or less than the required amount of overtime compensation would achieve an unfair economic advantage over competitors who abide by the requirements of the law. Such an unfair competitive advantage can only be removed if an employer is made to bear the full responsibility for paying what was wrongfully withheld.

3. Congress' choice to incorporate the FLSA's remedial scheme for unpaid minimum wages and overtime compensation into § 7 of the ADEA was an informed and carefully considered one. As this Court has pointed out, "in enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation." *Lorillard v. Pons*, 434 U.S. 575, 581 (1981). "This selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA." *Id.* at 582.

Congress used Title VII of the Civil Rights Act of 1964 as the model for the scheme of substantive prohibitions

enacted in the ADEA. But in shaping the ADEA Congress rejected the remedial scheme of Title VII, which provides for monetary remedies against unions. Instead, Congress adopted, indeed incorporated, the remedial scheme of the FLSA, which has a different remedial premise from that of Title VII. Against this background, Congress must be understood to have adopted not only the words of the FLSA but also its remedial premise: that the employer is to bear the full monetary consequences of his wrongful conduct.

4. There is no one "correct" remedial scheme for a statute such as ADEA. There is legitimate room for debate whether the FLSA scheme or some other scheme is best suited for enforcement of the ADEA. Whatever the relative wisdom of the various options, the choice is for Congress to make. By incorporating the FLSA provisions governing monetary relief for unpaid minimum wages and overtime compensation, Congress chose to place monetary liability for violations of the ADEA solely upon the employer.

ARGUMENT

The court below held that in Age Discrimination in Employment Act cases employers are solely liable for backpay found due and owing to their employees. That holding is correct as we now show.¹

1. In *Lorillard v. Pons*, 434 U.S. 575, 578-79 (1978), this Court recognized that "[p]ursuant to § 7(b) of the

¹ In this brief we address the third question stated by *Trans World Airlines* in its opening brief:

3. Whether a labor union which jointly violates the Age Discrimination in Employment Act with an employer is absolved as a matter of law from liability for back pay?

We note at the outset, however, that none of the plaintiffs in this case has raised that question. That being so, we submit that here, as in *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 91-95 & n.25 (1981), an employer may not ask this Court to determine whether the plaintiffs are granted a right to recover against a union.

[ADEA], violations of the ADEA generally are to be treated as violations of the FLSA. . . . [A]nd the rights created by the ADEA are to be 'enforced in accordance with the powers, remedies and procedures' of specified sections of the FLSA." See also *Lehman v. Nakshian*, 453 U.S. 156, 163 (1981). And, that provision is the only one that specifies the monetary relief to be accorded for ADEA violations. Thus, § 7(b) of the ADEA and the provisions of the FLSA incorporated therein control this case.

Of particular pertinence here, § 7(b) of the ADEA expressly provides: "Amounts owing to a person as a result of a violation of [the ADEA] shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title [i.e., §§ 16 and 17 of the FLSA]." As the unqualified term "amounts owing" indicates, Congress intended all possible "items of pecuniary or economic loss such as wages, fringe, and other job-related benefits" under the ADEA to be treated as unpaid minimum wages or overtime compensation. H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 13 (1978). Section 7(b), then, constitutes a "direct[ion]" that actions for lost wages under the ADEA be treated as actions for unpaid minimum wages or overtime compensation under the FLSA. . . ." *Lorillard*, 434 U.S. at 582.

2. Sections 16 and 17 of the FLSA—the sections specifically incorporated in § 7(b) of the ADEA—provide that in an action for unpaid minimum wages or overtime compensation only the "employer" may be held liable for a monetary award. Section 16 of the FLSA is the provision that defines the civil action for monetary relief based on a claim of unpaid minimum wages or overtime compensation that may be brought by either the affected employee or by the Secretary of Labor. Section 16(b), as codified in 29 U.S.C. § 216(b), states in pertinent part:

Any *employer* who violates the provisions of section 206 ["Minimum Wage"] or section 207 ["Maximum

hours"] of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be . . . [Emphasis added.]²

The FLSA defines "employer" as "not includ[ing] any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization." 29 U.S.C. § 203(d). It is therefore plain that § 16(b) does not authorize the courts to require a union to provide monetary relief for unpaid minimum wages or overtime compensation.

Section 16(c), 29 U.S.C. § 216(c), provides, in turn, that the Secretary of Labor may bring an action to recover the amounts that affected employees would be entitled to recover under § 16(b). Section 16(c) states that "[t]he Secretary is authorized to supervise the payment of unpaid minimum wages or the unpaid overtime compensation owing to any employee," and that the employee's acceptance of such payment shall constitute a waiver by the employee of his right to sue under § 16(b). Section 16(c) further provides that the Secretary may bring an action "to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages," and that an employee's right to sue under § 16(b) "shall terminate upon the filing of a complaint by the Secretary in an action under [§ 16(c)]. . . ."

As the interrelationship of the two sections makes clear, "[a] suit under § 16(c) . . . is essentially a representative action brought to enforce the private rights described

² The remainder of the quoted sentence states: "and in and additional equal amount as liquidated damages." This entitlement to liquidated damages is qualified by the affirmative defense in 29 U.S.C. § 260. The ADEA treats the issue of liquidated damages in a different fashion. Section 7(b) of the ADEA, in a proviso to the "amounts owing" sentence quoted *supra*, at 4, states "[t]hat liquidated damages shall be payable only in cases of willful violations of this chapter."

in § 16(b).” *EEOC v. Corry Jamestown Corp.*, 719 F.2d 1219, 1221 (3d Cir. 1983). See also *Wirtz v. Jones*, 340 F.2d 901, 904 (5th Cir. 1965) (“Under § 16(b) the employees may sue the employer for backpay, and under § 16(c) the Secretary . . . may bring the action”). Section § 16(c), in short, does not expand the parties who may be sued for unpaid minimum wages or overtime compensation, nor the measure of monetary relief that may be sought, beyond what is authorized by § 16(b). See S. Rep. No. 640, 81st Cong., 1st Sess. 8 (1949) (describing § 16(c) as an alternative procedure for recovering the unpaid wages that can be recovered from an employer under § 16(b)).

The same result obtains under § 17 of the FLSA. Section 17 authorizes the Secretary of Labor to bring suit for injunctive relief to restrain violations of the FLSA.³ In 1961, Congress repealed a proviso to § 17 that prohibited a court in a suit for injunctive relief brought by the Secretary from ordering “the payment of unpaid minimum wages or unpaid overtime compensation.” Pub. L. 81-393, § 15 (1949). In place of that proviso, the 1961 Congress inserted language stating that the relief available in a § 17 action may “include . . . the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter.” Pub. L. 87-30, § 12(b) (1961), codified at 29 U.S.C. § 217. This language was added to give the Secretary a more efficient means, free from the various procedural requirements attendant to a § 16 action, to obtain payment of unpaid minimum wages or overtime compensation. See H.R. Rep. No. 75, 87th Cong., 1st Sess. 27-28 (1961); S. Rep. No. 145, 87th Cong., 1st Sess. 39-40 (1961). The Conference Report accompanying the legislation makes clear that this addi-

³ As this Court recognized in *Lorillard*, “the courts [have] consistently declared that injunctive relief [under the FLSA] [is] not available in suits by private individuals but only in suits by the Secretary.” 434 U.S. at 581.

tional means to recover unpaid minimum wages or overtime compensation is, like a § 16 action, directed solely at employers:

Under [§ 17], the Federal district courts would be authorized, in injunction actions brought by the Secretary of Labor, to issue court orders requiring *employers* to cease unlawful withholding of minimum wages and overtime compensation found by the court to be due to employees under the act. [H.R. Conf. Rep. No. 327, 8th Cong., 1st Sess. 20 (1961) (emphasis added); see also H.R. Rep. No. 75, *supra* at 37; S. Rep. No. 145, *supra* at 51.]

That the employer is the sole source for an award of monetary relief under the FLSA is not a happenstance but rather a direct expression of the point of the Act as a whole. Congress was concerned that employers who pay less than the minimum wage or less than the required amount of overtime compensation would achieve an unfair economic advantage over competitors who abide by the requirements of the law. Thus, in § 2 of the FLSA, 29 U.S.C. § 202, Congress declared,

that the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . (3) constitutes an unfair method of competition in commerce;

Such an unfair competitive advantage can only be removed if an employer is made to bear the full responsibility for paying what was wrongfully withheld.

The need to eradicate this unfair competitive advantage has been a consistent theme as Congress has refined the remedial scheme of the FLSA over the years. In 1949, when Congress added subsection (c) to § 16 of the FLSA, for the first time authorizing the Secretary of Labor under certain circumstances to sue under § 16 for recov-

ery of unpaid minimum wages,⁴ the Senate Report justified that new power in part by reference to the following testimony offered by the Secretary:

[T]he existence of such power would tend to discourage employers from failing to pay minimum wages or overtime compensation, thus nullifying the competitive advantage which is created when employees fail to take action to recover unpaid back wages. The additional power being requested would foreclose an employer from benefiting from his violation of the act when injunction action is not appropriate. [S. Rep. No. 640, 81st Cong., 1st Sess. 7 (1949).]

In 1961, when Congress amended § 17 to permit the Secretary to recover unpaid minimum wages or overtime compensation in an injunction action, see *supra* at 6, a prime objective was to provide an additional means for eradicating unfair wage competition:

The proposed amendment would make [efforts to achieve compliance] much more effective by providing a practical method for requiring payment of the amounts of any wages or overtime compensation which an employer has failed or refused to pay, as required by the act. Placing the probability of financial liability on those employers who are presently careless of their obligations under the act would increase the level of compliance with the statute, and would protect complying employers from the unfair wage competition of the noncomplying employers. [H.R. Rep. No. 75, *supra*, at 28; S. Rep. No. 145, *supra*, at 40.]

3. Congress' "cho[ice] to incorporate the enforcement scheme of the [FLSA] into § 7 of the ADEA," *Lehman v. Nakshian*, 453 U.S. at 163, was an informed and carefully considered one. The *Lorillard* Court quoted the

⁴ Until 1949, only the affected employee could bring suit under § 16. Fair Labor Standards Act of 1938, ch. 676, § 16, 52 Stat. 1069 (1938); Pub. L. No. 81-393, § 14 (1949).

statement of Senator Javits, one of the floor managers of the bill, that ". . . in fact [the ADEA] incorporates by reference, to the greatest extent possible, the [enforcement] provisions of the [FLSA]." 434 U.S. at 582. The Court emphasized too that Congress in enacting the ADEA exhibited great "selectivity . . . in incorporating provisions and in modifying certain FLSA practices. . . ." *Id.* at 582. "[I]n enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation." *Id.* at 581. "*This selectivity . . . strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA.*" *Id.* at 582 (emphasis added).

Congress used Title VII of the Civil Rights Act of 1964 as the model for the scheme of substantive prohibitions enacted in the ADEA. *Lorillard*, 434 U.S. at 584, 585. But Congress rejected the remedial scheme of Title VII, which provides for monetary remedies against unions, *Lorillard*, 434 U.S. at 584-585. Instead, Congress adopted, indeed incorporated, the scheme of the FLSA, which as we have shown, has a different remedial premise from that of Title VII. *Id.* at 584-585; see *supra*, at 4-8. Against this background, Congress must be understood to have adopted not only the words of the FLSA but also its remedial premise: that the employer is to bear the full monetary consequences of his wrongful conduct.

4. TWA's main argument from the language of the ADEA is that the following sentence in § 7(b) is intended to depart from this remedial premise and to provide for union liability:

In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limi-

tation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.^[5]

But, viewed in context, this sentence cannot be understood to provide for any additional form of monetary relief, and certainly not for any new source for monetary relief. The language quoted by TWA directly follows the sentence that provides that all "amounts owing" under the ADEA "shall be deemed to be" unpaid minimum wages or overtime compensation for purposes of § 16 and § 17 of the FLSA. Consistent with that encompassing declaration, the only monetary relief described in the sentence relied upon by TWA is relief to "*enforce the liability for amounts deemed to be unpaid minimum wages or overtime compensation under this section*" (emphasis added); the relief for which the FLSA makes employers solely liable.⁶ Based on the language of § 7(b), this Court in *Lorillard* found that "Congress must have meant the phrase 'legal relief' to refer to judgments 'enforcing . . . liability for amounts deemed to be unpaid minimum wages or overtime compensation.'" 434 U.S. at 583, n.11. And, every court of appeals that has considered the question has concluded that the only monetary relief permitted under the ADEA is that which is authorized with respect to unpaid minimum wages or overtime compensation in §§ 16 and 17 of the FLSA.⁷

⁵ This passage is restated in § 7(c), without repetition of the examples of appropriate relief.

⁶ The departure from the FLSA scheme that is effected by the sentence relied up by TWA is to authorize private parties to bring injunction actions. See *Lorillard*, 434 U.S. at 581. In addition, the sentence serves to make clear that the courts are to provide forms of available equitable relief appropriate to the types of employment actions that would likely be the subject of age discrimination suits.

⁷ See *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 147-48 (2d Cir. 1984) (the provision that "amounts owing . . . shall be deemed to be unpaid minimum wages . . ." is "dispositive

TWA attempts to buttress its position by reference, at p. 41 of its brief, to passages in the legislative history indicating that Congress meant the ADEA to apply to unions as well as employers. But there is no dispute that the ADEA contains both prohibitions and remedies that apply to unions. The question here is whether Congress intended to make unions liable for monetary awards. None of the passages cited by TWA is addressed to this question. Certainly, none indicates a congressional intent to diverge from the FLSA remedial scheme that Congress chose to incorporate in the ADEA. That scheme provides that where a prohibition is equally applicable to employers and unions, only the employer is made liable for monetary relief.⁸

of the drafters' intentions," and precludes any other monetary relief); *Slatin v. Stanford Research Institute*, 590 F.2d 1292, 1295 (4th Cir. 1979) ("the broad language of [§§ 7(b) and (c)]—"The court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter"—is limited by the[] specific references to unpaid wages and overtime"); *Vasquez v. Eastern Air Lines, Inc.*, 579 F.2d 107, 109 (1st Cir. 1978) (ADEA's reference to "legal or equitable relief" is "limited by . . . the fact that amounts owing as a result of a violation are to be treated as if they were unpaid minimum wages or unpaid overtime compensation"); *Perrell v. Financeamerica Corp.*, 726 F.2d 654, 657 (10th Cir. 1984) ("every time the issue of permissible scope of damages has been addressed, each circuit court has held that the ADEA is limited to the damages specifically enumerated"—i.e., damages authorized by § 16 for unpaid minimum wages or overtime compensation); *Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684, 685-86 (7th Cir.), cert. denied, — U.S. —, 103 S.Ct. 453 (1982); *Bedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 809-10 (8th Cir. 1982); *Naton v. Bank of California*, 649 F.2d 691, 699 (9th Cir. 1981); *Dean v. American Security Ins. Co.*, 559 F.2d 1036, 1038 and n.6 (5th Cir. 1977), cert. denied, 434 U.S. 1066 (1978); *Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834, 839-40 (3d Cir. 1977), cert. denied, 434 U.S. 1022 (1978).

⁸ It is particularly striking that in the case of a retaliation violation under § 15(a)(3) of the FLSA, 29 U.S.C. § 215(a)(3)—which may be committed by a union as well as by an employer—the FLSA expressly provides for monetary relief only against the employer:

Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as

TWA also argues that this Court should interpret the ADEA as if it incorporates the remedial scheme of Title VII or of the National Labor Relations Act. But, as we have already shown, Congress had the option in fashioning the ADEA to adopt the remedial schemes of Title VII or the NLRA and, as this Court stated with specific reference to Title VII, "Congress rejected that course in favor of the FLSA [scheme]." *Lorillard*, 434 U.S. at 584-585. TWA asks no less than that this Court substitute a scheme that Congress rejected for one that it chose to adopt.

Finally, TWA suggests that "logic" and "policy" militate against a literal interpretation of the remedial provision of ADEA. Implicit in this suggestion is the notion that there is only one "correct" remedial scheme for a statute such as ADEA—the one that provides that where there are two or more defendants each should be held monetarily liable according "to the degree that they are each culpable." TWA Br. at 44. But, as we have already shown, the objective of the FLSA to eliminate unfair competition among employers points to a different remedial approach. And, as this Court has recognized in another context, there is legitimate room for debate whether deterrence of wrongdoing and enforcement of federal statutes is better assured where "most or all wrongdoers will be held liable and thus share the consequences of the wrongdoing" or where there is "the possibility . . . that a single participant could be held fully liable for the total amount of the judgment." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 636 (1981). Certainly, Congress is entitled to prefer the latter scheme where, as is the paradigm case under the ADEA, the commission of the wrong requires the partici-

may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. [§ 16(b), FLSA, 29 U.S.C. § 216(b).]

pation of the defendant who Congress determines is always to be held "fully liable."⁹ Whatever the relative wisdom of these diverse options, the choice is for Congress to make. And, by incorporating in the ADEA the FLSA provisions governing monetary relief for unpaid minimum wages and overtime compensation, Congress chose to place monetary liability for violations of the ADEA solely upon the employer.¹⁰

CONCLUSION

For the foregoing reasons, if the issue of union liability for monetary relief under the ADEA is decided by this Court, the decision of the Second Circuit on this issue should be affirmed.

Respectfully submitted,

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⁹ As one court has pointed out in the context of an Equal Pay Act case, "if employers are aware that they alone will bear the economic consequences of Equal Pay Act violations, a greater incentive would exist for resisting coercive pressures placed upon them by . . . unions." *EEOC v. Ferris State College*, 493 F. Supp. 707, 716 (W.D. Mich. 1980).

¹⁰ If, contrary to our submission, the Court determines that unions may be held monetarily liable under the ADEA, the case should be remanded for a determination by the lower courts of the appropriate principles for deciding the relative amount of monetary liability that the employer and the union should bear. That issue has not yet been addressed by either of the courts below and should not, in the first instance, be decided by this Court.

JUL 11 1984

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**On Writs of Certiorari to the United States
Court of Appeals for the Second Circuit**

**BRIEF FOR RESPONDENTS
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July 1984

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether an airline that involuntarily retires pilots at age sixty, strips them of their seniority, and refuses to allow them to transfer to flight engineer while allowing all similarly-situated younger pilots to retain their employment, has violated the Age Discrimination in Employment Act (ADEA).
2. Whether the violations of the ADEA were willful.
3. Whether unions are liable for back pay under the ADEA.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-997, 83-1325

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A.
PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COM-
MISSION and AIR LINE PILOTS ASSOCIATION, INTER-
NATIONAL,

Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A.
PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COM-
MISSION and TRANS WORLD AIRLINES, INC.,

Respondents.

On Writs of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS
HAROLD H. THURSTON, CHRISTOPHER J. CLARK,
AND C.A. PARKHILL

STATUTES AND REGULATIONS INVOLVED

In addition to the statutes set forth in the brief of petitioner Trans World Airlines, Inc. (TWA) (Br. 2-5) and in the statutory appendix to the brief of respondent Equal Employment Opportunity Commission (EEOC), another statutory provision involved is Section 15(a) of the Fair Labor Standards Act of 1938 (FLSA), as amended, 29 U.S.C. §215(a), which provides in relevant part:

After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—

* * *

(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under section 214 of this title;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

STATEMENT OF THE CASE

Respondents Harold H. Thurston, Christopher J. Clark, and Clifton A. Parkhill (Thurston respondents) adopt the Statement contained in the brief for EEOC.

This further statement is: (a) to focus on events in 1978, the year in which the Thurston respondents and four of the EEOC claimants (Lusk, Bobzin, Gowling, and Widmayer) turned age sixty and were forced to retire; and (b) to point to facts before the courts below regarding the states of mind of respondents TWA and Air Line Pilots Association, International (ALPA) in 1978 with respect to the Age Discrimination in Employment Act (ADEA) and the issue of employment of flight engineers beyond age sixty.

The parties agreed in the court of appeals that the case was in an appropriate posture for summary judgment as to liability. 713 F.2d 940, 944 n.5, 947 (A-5 n.5, A-13).¹ The record in this case is compiled principally from business records of TWA and ALPA, and from deposition testimony taken of petitioners' principals.

A. Preliminary Factual Matters.

A number of TWA's factual characterizations must be viewed in light of the undisputed facts:

¹ "A-__" refers to the decisions below which are reprinted in the appendix to TWA's December 16, 1983 petition for certiorari. "J.A. __" refers to the Joint Appendix filed in the Second Circuit which the parties may cite by permission of this Court (52 U.S.L.W. 3687). "R. __" refers to the numbered entries on the district court clerk's docket, reproduced in the Joint Appendix (J.A. 9-20).

1. 83% "success" rate. TWA states "83% of those Captains seeking to serve beyond age 60 have succeeded in that regard" (Br. 10). A company review at the end of 1978 shows (R. 96, Ex. 1; R. 175, Ex. 22):

Pilots retired at age sixty between April 6, 1978 and December 31, 1978—40

Number of pilots who have expressed a desire to fly as flight engineers after age sixty—17

Number of pilots who have been awarded a flight engineer bid and are flying as flight engineers—zero.

TWA did not employ age sixty Captains in the flight engineer position in 1978. The first two successful Captain bidders did not enter flight engineer training until the spring of 1979 after they reached age sixty (J.A. 675; R. 168, pp. 148-49).

2. "Only trunk airline." The fostered implication of TWA's carefully worded statement (Br. 29 and n.37)² is that it did not react to ongoing legal proceedings in changing its mandatory retirement policy. Prior to August 1978, TWA was in litigation on the issue in various administrative forums. Respondent Thurston had filed age dis-

² Almost all major carriers employ or have agreed to employ flight engineers beyond age sixty: Alaska, American, Braniff, Capitol, Continental, Federal Express, Flying Tiger, Northwest, Pan American, TWA, United, USAir, and Western. TWA is aware that there are around 500 flight engineers over age sixty on these carriers. The fact that at least six airlines have agreed to enter into consent decrees providing for the employment of former Captains as flight engineers beyond age sixty does not make their action any less "voluntary" than TWA's: *Worley v. Continental Air Lines, Inc.*, No. CV-80-1110-WMB(Kx) (C.D. Cal., consent decree entered December 27, 1982); *Kiehl v. Pan American World Airways, Inc.*, No. C-81-4274-WAI (N.D. Cal., consent decree entered Jan. 28, 1983); *Santorelli v. USAir, Inc.*, No. 81-1053-A (E.D. Va., consent decree entered Mar. 16, 1982); *Richardson v. Alaska Airlines, Inc.*, No. C-81-974V (W.D. Wash., consent decree entered Nov. 1, 1982); *Neuman v. Northwest Airlines, Inc.*, No. 79 C 1570 (N.D. Ill., consent decree entered April 5, 1983); *Penton v. The Flying Tiger Line, Inc.*, No. CV-81-4419-RJK (C.D. Cal.) (consent decree entered June 20, 1984).

crimination complaints with the U.S. Department of Labor and the State of California (R. 169, Exs. 7, 10). David J. Crombie, TWA's Senior Vice President of Administration, saw the Department of Labor complaint of another TWA crewmember as "a factor" in TWA's treatment of the issue, along with (J.A. 655):

- The necessity to deal with this whole problem in a manner designed not to scar the relationship we have with ALPA.

- The necessity to comply with the law expeditiously so that we do not build up a substantial back pay obligation.

3. *Bidding as the "basic mechanism."* TWA's fact statement (Br. 9-10) omits mention of displacements, the other principal mechanism of pilot movement under the contract. Section 19 of the pilot contract is entitled "Vacancies and Displacements," and Section 19(C)(1), which TWA partially quotes, requires TWA to "publish bulletins announcing vacancies, displacements, and assignment of pilots resulting from such vacancies and displacements" (J.A. 304).³ These bulletins are referred to collectively as "bid messages" (R. 168, p. 123). Bidding for vacancies occurs with an increase in flying time or manpower requirements; displacements occur with a decrease (*compare* §19(D)(1)(a) *with* §19(G)(1)(b); J.A. 304, 311). Pilot movement resulting from vacancies and displacements is "simultaneously effected" (§19(A)(1), §19(D)(1)(b); J.A. 302, 305). As with vacancies, displacement preferences are granted on a seniority basis (§19(A)(2), J.A. 305; §17, J.A. 294). A pilot may use his seniority to displace a less senior

³ The Thurston respondents were retired while the 1977 Working Agreement (J.A. 353) was in force. A larger portion of the 1979 Working Agreement is reproduced in the Joint Appendix (J.A. 250). Changes from the 1977 agreement are indicated by black lines in the margin (*see* J.A. 252).

pilot in any status at his current or last former domicile (A-11; §19(G), J.A. 311).

Between the April effective date of the 1978 ADEA Amendments and September 1, 1978, there were no flight engineer vacancies announced (A-10; R. 175, Ex. 16; J.A. 1020), although numerous displacements of pilots occurred (*see, e.g.*, R. 169, Ex. 5).

4. *"Minute" downgrading of pilots.* The court of appeals outlined various types of movement among younger pilots which result in a downgrade rather than the pilot losing his or her job (A-10 to A-11). Although there is no dispute that these practices occur under contractual and extra-contractual mechanisms, TWA now focuses on quantity, saying that the absolute numbers are "minute."

The court of appeals did not elaborate on the number of pilots who have bid or displaced to lower positions pursuant to posted bid messages, as it was undisputed that this practice occurred regularly. Instead, the court focused on situations where pilots under age sixty, dislodged from their former positions because of medical or other disqualifications, did not lose their employment totally. TWA's manpower planning head, Joseph Bryner, testified about these occurrences:

Disciplinary downgrades: "many instances" (J.A. 972); "Many times, over many years" (J.A. 1025). Disciplinary downgrading is not addressed in the contract (R. 168, p. 146).

Medical downgrades, §19(A)(3)-(4): two pilots are currently working as flight engineers under this practice, which first went in effect around 10 years ago (J.A. 968-70).

Student Captain or copilot failure to qualify, §6(B)(16): 20 permanent flight engineers (J.A. 946-47; J.A. 634).

Failure to requalify in pilot position, §6(B)(17): 10 to 12 in the past 3 to 5 years (J.A. 947-48, 997; J.A. 634).

5. *Flight engineer "status."* The August 10, 1978 bulletin issued by TWA states that "any cockpit crew member who is in a flight engineer status at age 60 may not be compelled to retire" (J.A. 425). The term "flight engineer status" was not defined (A-9).

"Flight engineer status" as used in the bulletin meant different things for different crewmembers. TWA interpreted it to include active and retired flight engineers as well as active and retired International Relief Officers (IROs) (J.A. 587). For Captains and First Officers, TWA interpreted the bulletin to mean that they had to bid on and be awarded a flight engineer vacancy with an "effective date" prior to the sixtieth birthday (A-9). This excluded retired Captains and First Officers (A-10).

The term "flight engineer status" as used in the August 1978 bulletin was for "purposes of policy," as distinguished from "status" under the pilot contract (R. 98, p. 368; *see id.* at 274, 370). IROs, for example, are in a contractual status separate from flight engineers (J.A. 1012-13; R. 98, pp. 270-74; R. 167, pp. 87-88; §33(F), J.A. 339-40). Except at age sixty when TWA drops them to flight engineer for policy purposes (J.A. 971), IROs must "bid like everyone else" if they want to become flight engineers (R. 98, p. 274). IROs, like other pilots, are subject to the FAA's "Age 60 Rule," 14 C.F.R. §121.383(c) (J.A. 1026; R. 98, p. 371).

Similarly, some Captains who have remained employed beyond age sixty have not actually become flight engineers until well after age sixty. For contractual and pay purposes, they remain in the "actual status of captain" with the "assigned status of flight engineer" (J.A.

989). Until 1980, TWA regularly scheduled flight engineer training to begin after the Captain's sixtieth birthday and after the "effective date" of the bid (J.A. 675). One TWA Captain turned age sixty in November 1979 but was not scheduled to begin flight engineer training until March 1980 (J.A. 988; J.A. 765, line 10).

B. Harold H. Thurston.

Respondent Thurston turned age sixty on June 11, 1978. His request to work beyond age sixty (J.A. 909) was denied not for lack of flight engineer vacancies, but solely because of age. The May 26, 1978 response to his request from J.E. Frankum, TWA's Vice President of Flight Operations, stated (J.A. 647):⁴

As you are aware, TWA's agreement with ALPA, which applies to you, as well as the retirement program established thereunder, provides that retirement is required upon reaching one's 60th birthday. Accordingly you will be duly retired on that date.

There were no considerations requiring Thurston's retirement other than the mandatory retirement age stated in the letter (R. 98, p. 320). Prior to this date, however, TWA had already recognized that the "new age 70 law destroys our defense for such retirement" (R. 165, ALPA Hilly Ex. 1).

C. Christopher J. Clark.

On July 19, 1978, respondent Clark wrote TWA to request to continue his employment beyond age sixty. By letter dated August 3, 1978, Joseph C. Hilly, TWA's Vice President of Labor Relations, wrote Clark to inform him

⁴ EEOC claimant Bobzin, who turned sixty on May 9, 1978, received a similar response (J.A. 643-44).

that TWA had not yet finalized its age sixty flight engineer employment practices. Mr. Hilly stated (J.A. 648):

Accordingly, for the time being at least, you will not be permitted to work as a flight engineer after you become sixty years of age. I want to assure you, however, that should our policies ultimately be such that they would have permitted you to continue to work after attaining age sixty, you will be reinstated effective on your sixtieth birthday, with the pay and benefits then applicable to flight engineers who continue to work after age sixty.

Mr. Clark relied upon Mr. Hilly's letter and understood it to mean he did not have to place a flight engineer bid (J.A. 922-24, 928). Despite TWA's assurance, Clark was required to retire on September 19, 1978.⁵

D. Clifton A. Parkhill.

Respondent Parkhill's sixtieth birthday was August 22, 1978. Prior to his sixtieth birthday, he bid the flight engineer vacancies with the "effective date" of September 1, 1978 (J.A. 916-17). His bid was denied and he was required to retire.⁶

The flight engineer awards effective September 1, 1978 were announced on August 30, 1978 (J.A. 471). Normally TWA posts vacancies months ahead of the effective date (R. 168, pp. 15, 139-40).

⁵ Respondent Clark contacted his chief pilot three times following TWA's August 10 announcement to inquire about his status. He was told that it was being handled out of TWA corporate headquarters and "I can't touch it with a ten-foot pole" (J.A. 923-28; see R. 96, pp. 86-87).

⁶ Similarly, EEOC claimant Gowling, who turned sixty on August 27, 1978, had his flight engineer bid denied (J.A. 592).

TWA has the discretion to advance or defer the effective date of a bid (J.A. 932). There is no contractual timetable for getting a crewmember trained to fulfill his bid (J.A. 933). At times TWA defers training because of personal hardship problems (J.A. 936).

E. Evidence of Willfulness in 1978.

The Statement in the brief for EEOC discusses TWA's short-lived July 1978 policy decision to comply fully with the ADEA and reemploy former Captains, such as respondent Thurston, without requiring a flight engineer bid (J.A. 426-27). Captain J.E. Frankum, TWA's Vice President of Flight Operations, "disavowed" that decision (J.A. 1005A). The "conscious decision" not to reinstate Thurston and other Captains who had been mandatorily retired (R. 98, pp. 253-54) was followed by TWA's implementation of its August 10, 1978 bulletin (J.A. 425) in a manner which resulted in the mandatory retirement of respondents Clark and Parkhill and the remaining EEOC claimants (A-9 to A-12).

Other evidence before the court below bears on the issue of willfulness. Over two months before Mr. Crombie's July 19, 1978 letter to ALPA stating TWA's views that the ADEA required the employment of pilots and flight engineers in the flight engineer position beyond age sixty, Mr. Crombie predicted that Captain Frankum would be "unhappy and difficult as to some of the implications of this new law,"⁷ and would have to be persuaded that "probably we have no legal defense to continue to force flight engineers off the airplane before age 70" (R. 165, ALPA Hilly dep., Ex. 1).

⁷ Captain Frankum agreed that this was an accurate statement of his position (J.A. 809).

During the summer of 1978, Captain Frankum had discussions with TWA's outside counsel on the question of whether the ADEA required TWA to permit flight engineers to fly past age sixty. Frankum "didn't think a hell of a lot of" counsel's opinion (R. 97, p. 113), and told Mr. Crombie that "him and his lawyers were full of it" (*id.* at 158).⁸

Captain Frankum acknowledged that Mr. Crombie was the "prime mover" on the age sixty question and was representing TWA's corporate position when he wrote the July 19, 1978 letter to ALPA (*id.* at 156-57; J.A. 1003-04). As to the letter itself, Captain Frankum said (J.A. 1005):

This letter was not written by Mr. Crombie. He signed it, but the letter and these options discussed here and this discussion of this whole damn thing was done by an attorney. I already told you before the attorney was ill-advised, misinformed and didn't know what the hell he was talking about.

"The attorney was wrong," Captain Frankum stated (R. 97, p. 198).⁹

By the time Captain Frankum took over responsibility on the age sixty ADEA issue when Mr. Crombie was hospitalized in early August 1978 (J.A. 1005A), there had

⁸ Counsel agreed that, in addition to changes under Fed.R.Civ.P. 30(e), certain expletives would be deleted from Captain Frankum's deposition and would not be read in open court. The edited testimony is reflected here.

⁹ Captain Frankum "didn't like their [outside counsel's] interpretation of the law because I hoped it would be different" (R. 97, p. 115). He asked a TWA staff member who had just graduated from law school to look at outside counsel's interpretation "specifically with the interest of continuing retirement at age 60 for all status of flight crew members. He was particularly interested in precluding flight engineers working beyond age 60 and asked me to review the ADEA and see what my opinion was." (J.A. 833; see R. 167, p. 22).

been numerous meetings among TWA upper management on the subject. Counsel was present at a number of these meetings.¹⁰ TWA representatives met with ALPA representatives as well, and counsel for one or both sides participated at times.¹¹ At a meeting in July attended by Frankum, Crombie, Hilly and outside counsel for both TWA and ALPA, there was "a lot of legal sparring around" concerning "what the law meant and what the law said" (R. 97, p. 204).

ALPA actively campaigned to persuade TWA to retain its age sixty mandatory retirement policy for all flight deck crew positions, and opposed TWA's action in August 1978 to attempt partial compliance with the ADEA (A-32). At first, ALPA appeared to accept the company's initial determination to comply fully with the amended law. On June 21, 1978, Jack Donlan, the Chairman of the ALPA Master Executive Council on TWA (MEC) issued a telex to MEC members (J.A. 1040):

TWA is tentatively planning imminent announcement of plans to retain pilots and flight engineers in active employment after age 60, with duty as flight engineer. Also, pilots and flight engineers who have retired since April 6, 1978, will be offered opportunity to return as flight engineer. Captains and First Officers desiring training as flight engineer will be so qualified.

The above is in accordance with the "Age Discrimination in Employment Act" which became effective April 6, 1978, and with our Working Agreement.

Shortly afterwards the MEC met, and heard from Mr. Crombie about TWA's plans to change its mandatory re-

¹⁰ R. 97, pp. 113, 152-59; R. 167, pp. 11-13, 15, 24-27.

¹¹ R. 97, pp. 198, 202-05; J.A. 1033-55; R. 165, ALPA Hilly Exs. 2, 7; R. 165, *Thurston Hilly Ex.* 3 at 3.

tirement policy (R. 97, p. 205). Thereafter, upon advice of outside counsel, the MEC resolved to file a lawsuit to prevent TWA from allowing anyone to work on the flight deck beyond age sixty before bargaining with ALPA, and to seek a declaratory judgment under the ADEA that TWA was not obligated to employ flight engineers beyond age sixty (R. 102, pp. 276-77 and Ex. 38; *see id.*, Exs. 37, 47).¹² Upon advice of outside counsel ALPA took the position that the 1978 ADEA Amendments were not in effect, and that until such later time as they became effective, the pilot contract did not allow anyone to work beyond the mandatory retirement age of sixty (R. 102, pp. 253-54; *see id.* at 231-38, 243-52, 257-60 and Exs. 32, 34, 35).

After ALPA filed its lawsuit, it submitted to TWA contract proposals regarding the employment of crewmembers beyond age sixty (R. 102, Ex. 36; *see* J.A. 58, 64-65 ¶30; J.A. 84, 87 ¶30). The proposed changes included, among others:

§2(G), (H). Segregation and classification into a separate job category all flight engineers over age sixty, with flight engineers under age sixty given the new title "Second Officer."

§17(A)(3). Provision for a separate seniority list for age sixty flight engineers, who would be furloughed before pilots under age sixty, and in reverse order

¹² That lawsuit was eventually filed on August 10, 1978, the same day TWA announced it would employ age sixty flight engineers. *Air Line Pilots Association, International v. Trans World Airlines, Inc.*, No. 78 Civ. 3707 (S.D.N.Y.) (J.A. 108). Summary judgment was granted against ALPA by the district court (A-50 to A-54) and the Second Circuit unanimously affirmed (A-13 to A-21). The Second Circuit held that there was no jurisdiction to entertain ALPA's ADEA declaratory judgment action as an "attempt to use the Act to cut off the rights of its older members" (A-21). ALPA did not petition for certiorari with respect to the outcome in its own lawsuit.

so that the most senior would be furloughed first. Upon recall, all pilots under age sixty would be recalled in regular seniority order, and then age sixty flight engineers would be recalled, with the most senior recalled last.

§23(B). Mandatory retirement for those who are not, or do not revert to, flight engineer before age sixty.

§23(G), §24(C). Elimination of disability retirement income and insurance coverage for those disabled during employment beyond age sixty.

Prior to the 1978 ADEA Amendments, ALPA had always opposed mandatory retirement rules based on chronological age (R. 101, Ex. 18). Right after the amendments, ALPA policy shifted to oppose age sixty downbidding to flight engineer (R. 102, Ex. 49). By November 1980, the ALPA Board of Directors formally endorsed age sixty mandatory retirement for all flight deck crewmembers, ordered "affirmative steps required to confirm such retirement age," and rescinded all prior policy opposing mandatory retirement (R. 115, Exs. 3-5).¹³

¹³ The court of appeals noted ALPA's admission that it was motivated to oppose employment of its older members based on economic considerations in favor of younger members (A-17 n.11). The concern for economic impact on furloughees was stated by ALPA's president (R. 102, pp. 290-91), who also testified that ALPA had made no safety determination that age sixty was a BFOQ for cockpit service (R. 100, pp. 30-32). He was concerned that raising the age limit might bring on more stringent medical and proficiency monitoring requirements, which he felt would be like "pointing a gun at the heads" of airline pilots (*id.* at 43-46).

SUMMARY OF ARGUMENT

The Second Circuit found, on undisputed facts, that TWA had discriminated against the Thurston respondents and EEOC claimants solely on the basis of age. TWA mandatorily retired these senior crewmembers at age sixty, severed their seniority rights, and refused to allow them to transfer to the flight engineer position. In contrast, TWA permits all younger pilots disqualified from their positions for any reason to retain their employment and exercise their seniority rights. This direct evidence of discriminatory treatment based solely on age was unrebutted by legitimate nondiscriminatory reasons, and was not justified by either the bona fide seniority system (29 U.S.C. §623(f)(2)) or the bona fide occupational qualification (29 U.S.C. §623(f)(1)) exceptions to the ADEA.

The court below properly found willful violations of the ADEA. The legislative history and purposes of the ADEA demonstrate that Congress did not intend to impose the specific intent standard derived from criminal law as a prerequisite to finding willfulness under the ADEA. Moreover, courts have not interpreted willfulness under other civil statutes as requiring proof of specific intent. The correct standard is the willfulness standard utilized in FLSA cases, which requires a showing that the defendant knew or should have known its actions were governed by the ADEA. Alternatively, the Second Circuit test satisfies the civil intent standard and other ADEA court tests for willfulness.

The policies and purposes of the ADEA favor a holding that labor organizations are subject to liability for age discrimination on the same terms as employers. Furthermore, the express language of the ADEA provides for this result. All violations of ADEA Section 4 are viola-

tions of FLSA Section 15, which applies to "any person," including a union. Since ALPA has violated the ADEA, it is liable to the individual respondents for all statutory relief, including money damages.

ARGUMENT

I.

THE CHALLENGED ACTIONS CONSTITUTE UNLAWFUL AGE DISCRIMINATION.

A. The Mandatory Retirement of Plaintiffs, the Severance of Their Seniority Rights, and the Refusal to Allow Them to Transfer to Flight Engineer Were Because of Age.

It is undisputed that TWA retired the Thurston respondents and EEOC claimants at age sixty, severed their seniority rights, and refused to allow them to transfer to the flight engineer position (A-10 to A-12). It is undisputed that younger employees who are disqualified from their pilot (Captain or First Officer) jobs for medical, proficiency or economic reasons are not required to forfeit their seniority rights or lose their employment entirely (A-10 to A-11). It is undisputed that, in contrast to the treatment accorded Thurston and his colleagues, TWA grants the downgrading requests of *all* younger pilots with sufficient seniority (A-24).¹⁴ Based on the undisputed facts, the court concluded that the "sole reason for [TWA's] discrimination against age-60 captains and first officers is their age; this is prohibited by the ADEA" (A-31).

¹⁴ TWA states that "in any seniority system, not everyone gets what he or she wants" (Br. 25). Notwithstanding this truism, TWA does not dispute the court of appeals' finding that all younger pilots with sufficient seniority are permitted to downgrade.

TWA challenges the court of appeals decision by misstating the holding. The court did not hold that "because TWA routinely accommodates other employees . . . for non-age reasons,' it must 'accord the same treatment to age-60 captains and first officers.'" (Br. 16-17). In full context, the court's summary of its previous nine-page (A-22 to A-30) discussion of the merits of the case reads (A-31, footnote omitted):

In short, because TWA routinely accommodates other employees who seek to downgrade to flight engineer for non-age reasons and has failed to come forward with a permissible reason for its refusal to accord the same treatment to age-60 captains and first officers, the *Thurston* litigants and the EEOC claimants must prevail on their ADEA claim. The sole reason for its discrimination against age-60 captains and first officers is their age; this is prohibited by the ADEA.

The court's holding proceeds from its analysis, on undisputed facts, that: (1) there was direct evidence of a differentiation based solely on age (A-24) and a conscious refusal on the part of TWA to retrain or relocate age sixty pilots solely because of age (A-30), which deprived respondents of employment and employment opportunities in violation of the ADEA (A-29); and (2) the statutory defenses asserted were legally insufficient to justify the discrimination (A-25 to A-29).

TWA twists the court's holding by seizing on the word "accommodates." This is a case about discrimination, not accommodation, *cf.* 42 U.S.C. §2000e(j). The court of appeals correctly defined the issue in a discriminatory treatment case such as this: whether an employer treats some people less favorably than others because of age (A-22 to A-23). 29 U.S.C. §623(a); *see* 29 U.S.C. §623(c); *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). The actions challenged here were mandatory retirement, sever-

ance of seniority rights and refusal to transfer because of age. It was those acts which the court held to be violations of the ADEA. What TWA does to "accommodate" younger pilots disqualified from their jobs formed part of the unrebutted evidence of discriminatory treatment, *i.e.*, less favorable treatment because of age. Contrary to TWA's argument, the court did not create a "new right" of accommodation based on age¹⁵ or expand an employer's ADEA obligations to require more than equal, nondiscriminatory treatment (A-29 to A-30). Instead, the court found specific violations based on well-established ADEA principles, and entered judgment accordingly.¹⁶

TWA attempts to escape the ultimate finding of discrimination by reverting to the district court's lockstep adherence to the *prima facie* case formulation in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). By addressing TWA's proffered reasons for its actions and finding them not to be "legitimate, nondiscriminatory rea-

¹⁵ TWA is incorrect in arguing that respondents received the same "accommodations" as younger crewmembers (Br. 17). At age sixty they were stripped of their seniority and lost all opportunity to exercise contractual entitlements, whether it be to bid on a flight engineer vacancy or to downgrade to flight engineer in the event of a medical disqualification.

¹⁶ TWA alludes to general injunctive relief which may be sought by the EEOC at some later stage in the proceedings (Br. 20). The court did not rule on this request. TWA further attempts to stretch the court's holding with an out of context quotation from respondent Thurston's arbitration (Br. 20 n.22). There Thurston was pursuing his contractual rights under a grievance procedure, rights which are wholly apart from his ADEA rights. The arbitrator was not concerned with whether there was discrimination based on age in forcing Thurston to retire and in denying the downbid request, and the arbitration board expressly "render[ed] no opinion with respect to any legal rights that Captain Thurston might have under the ADEA" (J.A. 530). *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *McDonald v. City of West Branch*, 104 S.Ct. 1799 (1984); *see Criswell v. Western Air Lines, Inc.*, 709 F.2d 544, 547-49 (9th Cir. 1983), *pet. for cert. filed*, 52 U.S.L.W. 3722 (U.S. April 3, 1984) (No. 83-1545).

son[s],” *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981), the court of appeals correctly transcended the *prima facie* case stage of *McDonnell Douglas*. This Court has stated that the *McDonnell Douglas* formulation should not be used to “evade[] the ultimate question of discrimination *vel non*.” *United States Postal Service Board of Governors v. Aikens*, 103 S.Ct. 1478, 1481 (1983). As the case was in a summary judgment posture (A-5 n.5), the court of appeals appropriately proceeded directly to the specific inquiry of “whether the defendant intentionally discriminated against the plaintiff.” *Id.* at 1482, quoting *Burdine*, 450 U.S. at 253.¹⁷

The court of appeals framed the discrimination issue in the same manner as this Court has framed it in related contexts: whether the employer treats “some people less favorably than others” because of their membership in the protected class (A-22 to A-23). *Aikens*, 103 S.Ct. at 1482, quoting *Teamsters*, 431 U.S. at 335 n.15. The test is whether, but for respondents’ age, their treatment would have been different. See *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (sex discrimination). Under the ADEA, the courts of appeals almost universally have applied the “but for” test to mean that age must be a determining factor, *i.e.*, one that made a difference in the employment decision at issue.¹⁸ Here the court found that age was not only “a

¹⁷ Whereas this Court in *Aikens* was confronted with a full record on disputed facts, the principle is the same where the case is ripe for summary judgment. In either instance, the “court has before it all the evidence it needs to decide whether ‘the defendant intentionally discriminated against the plaintiff.’” 103 S.Ct. at 1482.

¹⁸ *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979); *Geller v. Markham*, 635 F.2d 1027, 1035 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); *Smithers v. Bailar*, 629 F.2d 892, 896-97 (3d Cir. 1980); *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1112 (4th Cir.), *cert. denied*, 454 U.S. 860 (1981); *Carter v. Maloney Trucking &*

(Footnote continued on following page)

determining factor,” but was the sole reason for TWA’s actions (A-31).¹⁹

The court below correctly rejected a number of TWA’s arguments repeated here. First, respondents were not barred by the *McDonnell Douglas* formulation from making out a *prima facie* case by the alternative method of adducing direct proof of age discrimination (A-22 to A-24). See *Spagnuolo*, 641 F.2d at 1113; *Douglas v. Anderson*, 656 F.2d 528, 531 (9th Cir. 1981); *Stone v. Western Air Lines, Inc.*, 544 F.2d 33, 36-37 (C.D. Cal. 1982). TWA’s attempt to confine the inquiry to whether there was a flight engineer “vacancy” begs the ultimate issue of discrimination in this case, where downward movement to flight engineer among younger pilots occurred by contractual mechanisms other than bid vacancies and, in some instances, without authority in the contract at all (pp. 5-6, *supra*).²⁰ Second, the fact that some age sixty Captains have successfully downbid to flight engineer does not justify the discrimination against respondents (A-25).

¹⁸ continued

Storage, Inc., 631 F.2d 40, 42 (5th Cir. 1980); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 317 (6th Cir. 1975); *Golomb v. Prudential Insurance Co. of America*, 688 F.2d 547, 550-51 (7th Cir. 1982); *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958, 960 (8th Cir. 1978); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 984-85 (9th Cir. 1981); *Anderson v. Savage Labs*, 675 F.2d 1221, 1224 (11th Cir. 1982); *Cuddy v. Carmen*, 694 F.2d 853, 856-57 (D.C. Cir. 1982).

¹⁹ Under the “age as a determining factor” test, an ADEA plaintiff is not required to prove that age was the exclusive reason for the employment decision. *Parcinski v. Outlet Co.*, 673 F.2d 34, 36 (2d Cir. 1982), *cert. denied*, 103 S.Ct. 725 (1983); *Golomb*, 688 F.2d at 551-52.

²⁰ TWA now says that such downgrading by younger pilots is “minute.” The undisputed facts show otherwise, especially with regard to displacements which occur in the absence of vacancies (pp. 4-5, *supra*). Moreover, the absolute number of younger pilots who have utilized the specialized provisions to downgrade to flight engineer rather than lose their jobs entirely is irrelevant. The fact that TWA and ALPA have institutionalized the procedures means that they are available for all who need them, except for age sixty Captains and First Officers.

Connecticut v. Teal, 457 U.S. 440, 455 (1982). Besides, TWA did not allow any age sixty Captain to work as a flight engineer until 1979, after the Thurston respondents and the majority of the remaining EEOC claimants had turned age sixty.²¹ Third, the finding of liability here does not afford respondents “special treatment” or “special working conditions.” The court cited the same ADEA principles referred to by TWA here and found (A-29 to A-30): “Appellants do not ask for ‘special treatment,’ *Parcinski*, [673 F.2d at 37]; rather they merely seek the same treatment accorded all younger captains and first officers who become unable to serve in their former capacities for non-age reasons. There is nothing ‘special’ or ‘preferential’ about equal treatment.” The court also pointed out that TWA’s “conscious refusal” to transfer age sixty Captains and First Officers violated the ADEA’s ban on equal treatment (A-30). *Williams v. General Motors Corp.*, 656 F.2d 120, 129-30 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *Coates v. National Cash Register Co.*, 433 F.Supp. 655, 661 (W.D. Va. 1977).

B. The ADEA §4(f)(2) Bona Fide Seniority System Defense Is Inapplicable.

TWA argues that its actions are justified by the “bona fide seniority system” exception in ADEA Section 4(f)(2), 29 U.S.C. §623(f)(2). Although this was one of TWA’s principal statutory defenses rejected by the court of appeals, it was absent from the petition for certiorari. If it is to be considered, *cf.* Supreme Court R. 21.1(a), it should be rejected for the reasons stated by the court of appeals (A-25 to A-26):

TWA asserts that its contested practices are part of a bona fide seniority system and thus liability is fore-

²¹ In 1978, the year in which the Thurston respondents turned age sixty, TWA’s “success rate” was zero (p. 3, *supra*).

closed under 29 U.S.C. §623(f)(2). Appellants, however, do not challenge the operation of the seniority system, but their summary exclusion from it at age 60. The employment practice at issue in this lawsuit—the severing of age 60 captains from the company—is in no way mandated by the negotiated seniority system. That system provides only that seniority rights shall be forfeited upon severance from the company, but it does not, and lawfully cannot, specify that pilots who attain age 60 shall be severed. See *id.* §623(f)(2) (no bona fide seniority system “shall require or permit the involuntary retirement of any individual . . . [protected under the Act] because of the age of such individual”). TWA’s practice, “which equates involuntary retirement as a captain at age 60 with a complete severance from the company,” *Stone v. Western*, *supra*, 544 F.Supp. at 37, is not part of a bona fide seniority system. The bona fide seniority defense is therefore unavailable to TWA as a matter of law. See *Johnson v. American Airlines, Inc.*, [31 Empl.Prac.Dec. [CCH] ¶33,417 (N.D. Tex. 1983)].

The bona fide seniority system defense may not be invoked as a “legitimate, nondiscriminatory reason” under the *McDonnell Douglas v. Green* formulation (TWA Br. 25-28). Where it is available, it is an affirmative defense which places the burden of proof on the employer to prove that its actions come within the narrow exception. See *Sexton v. Beatrice Foods Co.*, 630 F.2d 478, 483-88 (7th Cir. 1980); *EEOC v. County of Santa Barbara*, 666 F.2d 373, 375, 377-78 (9th Cir. 1982); *EEOC v. Home Insurance Co.*, 672 F.2d 252, 257 (2d Cir. 1982); *EEOC v. Baltimore & Ohio R.R.*, 632 F.2d 1107, 1110-11 (4th Cir. 1980), *cert. denied*, 454 U.S. 825 (1981); *cf. Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974) (Equal Pay Act defenses, including seniority system defense, are affirmative defenses). Here TWA’s actions are expressly age-based. At age sixty, a Captain or First Officer “goes off the

seniority list" (J.A. 974) and is required to retire.²² As age is the sole determinant in these actions, they cannot be justified as "nondiscriminatory" reasons or as reasonable factors "other than age" (A-26 n.15).²³

C. The ADEA §4(f)(1) Bona Fide Occupational Qualification (BFOQ) Defense Is Inapplicable.

ALPA and TWA contend that because crewmembers may not serve as Captains or First Officers beyond age 60 under the FAA's Age 60 Rule, they may be lawfully retired and precluded from serving as flight engineers under the bona fide occupational qualification (BFOQ) exception to the ADEA, 29 U.S.C. §623(f)(1). The Second Circuit properly rejected this argument, noting that "it would create an exception that would swallow the Act" (A-29). The court stated (A-28):

ALPA's argument is unpersuasive. The terms of §623(f)(1) plainly reveal its purpose, which is to excuse only those age-based actions against employees that are related to the "particular job" (in this case captain or first officer). The Senate Report makes this clear. S. Rep. No. 493, 95th Cong., 2d Sess., 10-11, *reprinted in* 1978 U.S. Code Cong. & Ad. News 513-14.

²² In arguing that the Section 4(f)(2) seniority system defense is applicable, TWA attempts to circumvent the flat ban on mandatory retirement in that provision by contending that the FAA's Age 60 Rule, not TWA, forced respondents to retire. The FAA was not involved in TWA's retirement of respondents (A-10; J.A. 647). The FAA rule by its terms speaks only to cockpit "services" as Captain, First Officer or IR0, and does not govern service as flight engineer or employment relations as such (J.A. 543-47, 869-71). TWA's argument is defeated by its own practices from 1978 to 1980, when it employed some age sixty pilots who were still in a "status" (though not actively working in that status) subject to the Age 60 Rule (pp. 6-7, *supra*).

²³ Even if TWA's actions were considered as "reasonable factors other than age" under 29 U.S.C. §623(f)(1), they would still fail the "age as a determining factor" test (pp. 18-19, *supra*).

See also H.R. Rep. No. 527, [95th Cong., 1st Sess.] at 12.

That age less than 60 is a BFOQ for the particular job of captain or first officer provides no license for TWA to discriminate against those over 60 who wish to transfer to positions as flight engineers, for which age 60 is *not* a BFOQ, by permitting other captains and first officers to do so. To hold otherwise would frustrate the purpose of the ADEA, which is "to promote employment of older persons" and "to prohibit arbitrary age discrimination in employment," 29 U.S.C. §621(b), and the purpose of the 1978 amendments, which is "to protect older workers from involuntary retirement, . . . to insure that older individuals who desire to work will not be denied employment opportunities solely on the basis of age." S. Rep. No. 493, *supra*, at 1, *reprinted in* 1978 U.S. Code Cong. & Ad. News 504; see also H.R. Rep. No. 527, *supra*, at 1, 2.

This holding is consistent with the construction of the BFOQ exception in other ADEA cases, including those in which the employer has attempted to utilize the FAA's Age 60 Rule to support a BFOQ for positions not covered by the rule. *Criswell*, 709 F.2d at 551 (flight engineer); *Stone*, 544 F.Supp. at 37-38 (same); *Tuohy v. Ford Motor Co.*, 675 F.2d 842, 845 (6th Cir. 1982) (corporate pilot); *EEOC v. City of St. Paul*, 671 F.2d 1162, 1165-66 (8th Cir. 1982) (fire chief); *Orzel v. City of Wauwatosa Fire Department*, 697 F.2d 743, 749 (7th Cir.), *cert. denied*, 104 S.Ct. 484 (1983) (municipal firefighter); see *EEOC v. County of Los Angeles*, 706 F.2d 1039, 1041-42 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 984 (1984) (hiring age for helicopter pilots); *contra*, *Johnson v. Mayor of Baltimore*, 731 F.2d 209 (4th Cir. 1984).

The court of appeals dismissed ALPA's lawsuit which was brought to establish age sixty as a BFOQ for flight engineers (A-16 to A-21). Petitioners' attempt to obtain the same result indirectly, by reliance on a BFOQ as-

sportedly applicable to a different job than the one in issue, must again be rejected as contrary to the ADEA's purposes.

II.

THE COURT BELOW PROPERLY FOUND WILLFUL VIOLATIONS OF THE ADEA.

TWA argues that the standard for a finding of willfulness under the ADEA should be the specific intent requirement derived from criminal law. Otherwise, TWA argues, liquidated damages would be "automatic" in any case involving discriminatory treatment. On the facts of this case, a finding of willfulness would be required under any legal standard (pp. 7-13, *supra*). The issue before this Court, however, involves the appropriate legal standard for willfulness, not just whether a finding of willfulness flows automatically from a violation in a particular case.²⁴

The specific intent test TWA advocates has been roundly rejected. It is inconsistent with the standard for willfulness in the FLSA and other civil statutes, and with every ADEA circuit case that has decided the issue, except one.²⁵ The correct standard is the willfulness standard

²⁴ A plaintiff's proof under the ADEA may range from compelling direct evidence of discriminatory intent in a case such as this, to a disparate impact case in which no proof of motivation is required. Willfulness, like liability, proceeds from the facts of each particular case, and it is not possible to state categorically that a finding of willfulness will or will not accompany a violation in any type of case. See *McDonnell Douglas*, 411 U.S. at 802 n.13.

²⁵ The Second Circuit rejected a specific intent test (A-33), as have six other courts of appeals. *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1184-85 (6th Cir. 1983); *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 155-56 (7th Cir. 1981); *Hedrick v. Hercules*, 658 F.2d 1088, 1096 (5th Cir. 1981); *Spagnuolo*, 641 F.2d

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utilized in FLSA cases, which requires a showing that the defendant knew or should have known its actions were governed by the ADEA. Alternatively, the Second Circuit's test for willfulness, which requires that an employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA" (A-33), is modeled on an appropriate civil intent standard and satisfies the requirements in ADEA cases decided by other circuits.

A. The Test for Willfulness Under the ADEA Does Not Require Proof of Specific Intent.

TWA cites no direct statement from the ADEA legislative history that proof of specific intent is required for a finding of willfulness. An examination of the legislative history and the purposes of the ADEA demonstrates that the test for willfulness under the ADEA does not require proof of specific intent.

The liquidated damages provision of Section 7(b) originates from an amendment proposed by Senator Javits. The prior age discrimination bill would have imposed criminal penalties for willful violations. S.830, H.R. 3651, 90th Cong., 1st Sess., 113 Cong. Rec. 2794-96 (1967). Under the amended bill, these criminal penalties were eliminated and replaced by the civil liquidated damages remedy. See 113 Cong.Rec. 7077 (1967) (Amendment No. 125); S. 830, 90th Cong., 1st Sess., §7(b) as reported from Committee on Labor and Public Welfare, 113 Cong.Rec. 31248 (1967). As Senator Javits explained, the civil remedy would "furnish an effective deterrent to willful violations"

²⁵ continued

at 1114; *Kelly*, 640 F.2d at 980; *Mistretta v. Sandia Corp.*, 639 F.2d 588, 595 (10th Cir. 1980); *Wehr v. Burroughs Corp.*, 619 F.2d 276, 283 (3d Cir. 1980). But see *Loeb*, 600 F.2d at 1020 n. 27 (citing without discussion pattern jury instruction on criminal willfulness).

and, at the same time, avoid the "difficult problems of proof which would arise under a criminal provision." 113 Cong.Rec. 7076 (1967).

Rejection of the criminal sanctions originally proposed for Section 7(b) supports the presumption that Congress intended willful violations of the ADEA to be judged by civil rather than criminal standards. Whereas willfulness in a criminal context typically requires a showing of bad purpose—or specific intent—to disobey or disregard the law,²⁶ in a civil context the term is most often employed to distinguish between accidental conduct and conduct which is intentional, knowing, voluntary or marked by careless disregard. Specific intent is not a prerequisite for finding liability. *United States v. Murdock*, 290 U.S. 389, 394 (1933).²⁷

²⁶ The *mens rea* requirement generally remains an indispensable element of the prosecution's burden of proof in a criminal case. Typically, it has two components. First, there must be knowledge, and second, there must be a showing of bad purpose (or willfulness). See, e.g., *Morissette v. United States*, 342 U.S. 246, 250-51 (1952); *Dennis v. United States*, 341 U.S. 494 (1951). In a criminal context, willfulness refers to a bad purpose to disobey or disregard the law, and generally connotes a higher degree of specific intent than does "knowing," which has to do with the intentional doing of an act which the law forbids. *United States v. Sirhan*, 504 F.2d 818, 820 n.3 (9th Cir. 1974).

²⁷ Only in rare instances will courts interpret willful, as used in a civil statute, to require proof of specific intent in the criminal sense. For example, the Temporary Emergency Court of Appeals adopted a restrictive definition of willful in *Longview Refining Co. v. Shore*, 554 F.2d 1006, 1012-13 (T.E.C.A. 1977), a case involving the Economic Stabilization Act of 1970. Based on an examination of the legislative history, the court concluded that Congress expressly intended to apply a criminal rather than a civil willfulness standard. The Third Circuit reached a similar result in *Frank Irey Jr., Inc. v. Occupational Safety and Health Review Commission*, 519 F.2d 1200, 1207 (3d Cir. 1975). There, however, the court adopted a restrictive interpretation in order to distinguish between two types of violations created under the statute—"serious violations"

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Further support for rejecting a specific intent standard is provided by the FLSA, which imposes less than a specific intent requirement even in its criminal enforcement provisions. Section 16(a) of the FLSA—which Congress declined to incorporate into the ADEA when it incorporated the liquidated damages provisions of Section 16(b) and (c)—imposes criminal penalties for willful violations. Nevertheless, courts interpreting this provision have refused to apply a specific intent standard, holding instead that a willful violation of the FLSA may be established by showing that a defendant's actions were deliberate, voluntary or intentional. *Nabob Oil Co. v. United States*, 190 F.2d 478, 480 (10th Cir.), *cert. denied*, 342 U.S. 876 (1951) (FLSA does not require that an offense be committed "malevolently, with bad purpose or an evil mind"); *Hertz Drivursel Stations v. United States*, 150 F.2d 923, 928-29 (8th Cir. 1945). See also *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute"). To adopt the strict criminal intent standard for the ADEA would lead to the anomalous result that a plaintiff seeking civil damages for willful age discrimination would have a higher burden to meet than the government seeking criminal sanctions for willful violations of the FLSA. The legislative history of Section 7(b) of the ADEA indicates that Congress intended precisely the opposite result.²⁸

²⁷ continued

and "willful or repeated" violations. The court explained that a specific intent standard was necessary to maintain the gradations of penalties and violations established under the statute. Neither policy argument applies to the ADEA.

²⁸ See, e.g., Senator Javits' comments concerning substitution of a liquidated damages remedy under the ADEA for the criminal

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To make proof of specific intent a requirement for collecting civil damages under the ADEA also would run counter to the manner in which courts have interpreted willfulness under other civil statutes. The clear weight of authority holds that in a civil context "willful" will be interpreted broadly to include a wide range of conduct not limited to the specific intent requirement of criminal law. Courts have consistently followed this policy in interpreting provisions of the Internal Revenue Code²⁹ and in construing willfulness under other civil statutes which, like the ADEA, seek to distinguish between purposeful violators and violators whose actions are inadvertent, unintentional, or merely negligent. See, e.g., *United States v. Illinois Central Railroad Co.*, 303 U.S. 239, 243 (1933) (Railway Labor Act); *Bruce v. United States*, 621 F.2d 914, 917 n. 6 (8th Cir. 1980) (Privacy Act); *Brown-Forman Distillers Corp. v. U.S. Treasury Dept.*, 591 F.2d 375 (6th

²⁸ continued

sanctions originally proposed by the Administration. Referring to the liquidated damage provisions of Sections 16(b) and (c) of the FLSA, Senator Javits explained that the criminal provision proposed for the ADEA "is not only unnecessary but self-defeating . . . I would rather stick with the civil remedy as we do under the minimum wage law" 113 Cong.Rec. 2199 (1967). See also *Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 27 (1967) (statement of Sen. Javits) ("there is no use giving people the argument that it has criminal sanctions as a reason for refusing to cooperate or testify in investigations or proceedings").

²⁹ See, e.g., *United States v. Pompiano*, 429 U.S. 10, 12 (1976) (willful does not require proof of any motive other than intentional violation of a known legal duty); *United States v. Bishop*, 412 U.S. 346, 381 (1973) (Congress intended the criminal penalties for willful violations to separate the purposeful tax violators from the well-meaning but easily confused mass of taxpayers); *Kalb v. United States*, 505 F.2d 506, 511 (2d Cir. 1974) (evil motive or intent to defraud not necessary to prove willfulness); *Monday v. United States*, 421 F.2d 1210, 1215 (7th Cir.), cert. denied, 400 U.S. 821 (1970) (conduct is willful if voluntary, conscious or taken with a reckless disregard for obvious or known risks).

Cir. 1979) (Federal Alcohol Administration Act); *Aero Mayflower Transit Co. v. I.C.C.*, 535 F.2d 997, 1000 (7th Cir. 1976) (Interstate Commerce Act); *Lauretex Textile Corp. v. Allton Knitting Mills*, 519 F.Supp. 730, 733 (S.D.N.Y. 1981) (Copyright Act).

TWA proposes a specific intent standard on the ground that liquidated damages are punitive rather than compensatory under the ADEA and therefore require some showing of malice or wantonness (Br. at 34-35). This Court rejected a similar argument in *Overnight Motor Transportation Co., Inc. v. Missel*, 316 U.S. 572, 583 (1942), when it held that the liquidated damages provision of Section 16(b) of the FLSA was compensatory rather than punitive. The same reasoning applies to Section 7(c) of the ADEA, which incorporates the "powers, remedies and procedures," including the liquidated damages provision, of Section 16(b) of the FLSA. See *Gibson v. Mohawk Rubber Corp.*, 695 F.2d 1093, 1102 (6th Cir. 1982); *Kolb v. Goldring*, 694 F.2d 869, 872 n.2 (1st Cir. 1982).

The similar treatment accorded prejudgment interest under the FLSA and the ADEA reinforces the argument that the ADEA's liquidated damages provision is compensatory, not punitive. It is settled that the FLSA does not permit successful plaintiffs to obtain prejudgment interest in addition to liquidated damages. As explained in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 715-16 (1945): "Allowance of interest on minimum wages and liquidated damages recoverable under §16(b) tends to produce the undesirable result of allowing interest on interest." Courts have applied a similar reasoning in ADEA cases, holding that the compensatory nature of a liquidated damages award precludes a plaintiff from recovering additional, or duplicative, compensation in the form of prejudgment in-

terest. *Gibson*, 694 F.2d at 1102; *Spagnuolo*, 641 F.2d at 1114.³⁰

B. The Standard of Willfulness Is the Same Under the ADEA and FLSA, and There Is No Good Faith Exception.

The Thurston respondents adopt the brief for EEOC on this point and further respond briefly to the "good faith" argument raised by TWA and amicus United Air Lines, Inc.

TWA argues that if this Court adopts the FLSA willfulness standard and holds that a defendant's violation of the ADEA is willful if it knew or should have known its actions were governed by the statute, then this Court should also permit a trial court discretion to deny or reduce a liquidated damages award if the defendant shows it acted in good faith (Br. at 37, n.49). The Fifth Circuit has taken this position and is alone in concluding that the ADEA incorporates the good faith provision of Section 11 of the Portal-to-Portal Act, 29 U.S.C. §260. *Elliott v. Group Medical & Surgical Services*, 714 F.2d 556, 558 n.2 (5th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3860 (1984); *Hedrick*, 658 F.2d at 1096; *Hayes v. Republic Steel Corp.*, 531 F.2d 1307 (5th Cir. 1976).

There is no support for such an interpretation. In *Lorillard*, this Court found that "in enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provi-

³⁰ This does not mean a plaintiff is always precluded from collecting prejudgment interest under the ADEA. Under both the FLSA and the ADEA, the award of prejudgment interest would be proper if no liquidated damages are awarded or if the liquidated damages awarded are less than the interest that would have been due from the date the back pay claim accrued. *McClanahan v. Mathews*, 440 F.2d 320, 325-26 (6th Cir. 1971); *accord*, *Gibson*, 695 F.2d at 1102 n. 9.

sions and their interpretations," 434 U.S. at 581. Indeed, Section 7 of the ADEA adopts specific provisions of both the FLSA and the Portal-to-Portal Act, but makes no reference to the good faith provision of Section 11. If Congress had intended the award of liquidated damages under the ADEA to be limited by Section 11, that provision would have been specifically incorporated. *See Loeb*, 600 F.2d at 1020; *Syvock*, 665 F.2d at 154; *Kelly*, 640 F.2d at 981; *Wehr*, 619 F.2d at 279.

Amicus United Air Lines, Inc. argues that a good faith exception is necessary to accommodate a defendant asserting a statutory affirmative defense (Br. 6-7). Absent such an exception, United suggests that a defendant will automatically be liable for liquidated damages if its defense fails.³¹ This reasoning, however, ignores the fact that a finding of willfulness depends upon a defendant's state of mind at the time the discriminatory acts occurred. *Syvock*, 665 F.2d at 155.

C. Alternatively, the Second Circuit Test Satisfies the Civil Intent Standard and Other ADEA Court Tests for Willfulness.

Under the Second Circuit's willfulness test an employer will be liable for liquidated damages if it "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA" (A-33). This test comports with the civil standard of willfulness adopted in *Murdock*, 290 U.S. at 394:

The word often denotes an act which is intentional, or knowing, or voluntary as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose. The

³¹ United did not appeal this point in its own case, although the willfulness instruction given was patterned after *Syvock*, and therefore omitted any reference to "good faith."

word is also employed to characterize a thing done without ground for believing it is lawful or conduct marked by careless disregard whether or not one had the right so to act.

The "knowing and voluntary" test of *Murdock*, the model for the Second Circuit test, remains the general standard for interpreting willfulness in a civil context.³²

The Second Circuit's test also satisfies the willfulness requirements prevalent in ADEA cases. The Fourth, Fifth and Tenth Circuits utilize the FLSA test for willfulness in ADEA cases. These courts hold that a defendant willfully violates the ADEA if it knew or should have known its actions were governed by the ADEA. *Crosland v. Charlotte Eye, Ear & Throat Hospital*, 686 F.2d 208, 217 (4th Cir. 1982); *Hedrick*, 658 F.2d at 1096; *Mistretta*, 639 F.2d at 595. A showing that defendant knew or should have known its conduct was prohibited by the ADEA necessarily encompasses the FLSA standard for willfulness.

The Third, Sixth, Seventh and Ninth Circuits employ willfulness tests which, like the Second Circuit test, re-

³² See, e.g., *Pompiano*, 429 U.S. at 12 (Internal Revenue Code); *Bruce*, 621 F.2d at 917 n. 6 (Privacy Act); *Lauretex*, 519 F.Supp. 730 (Copyright Act); *Carroll v. Exxon Corp.*, 434 F.Supp. 557, 560-61 (E.D.La. 1977) (Fair Credit Reporting Act). See also *Illinois Central Railroad Co.*, 303 U.S. at 243, a case brought under the Railway Labor Act involving the willful failure to properly feed and water animals. The Court adopted *Murdock*, explaining:

'Willfully' means something not expressed by 'knowingly,' else both would be used conjunctively. * * * But it does not mean with intent to injure the cattle or to inflict loss upon their owner because such intent on the part of the carrier is hardly within the pale of actual experience or reasonable supposition. * * * So, giving effect to these considerations, we are persuaded that it means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.

quire some showing of defendant's actual or constructive knowledge that its conduct was prohibited. The Ninth Circuit requires that a violation be "knowing and intentional." *Kelly*, 640 F.2d at 980. Under the Third Circuit's formulation, a defendant's actions are willful if they are either "voluntary and not accidental, mistaken or inadvertent" or taken "in reckless disregard of consequences." *Wehr*, 619 F.2d at 283.³³ The Sixth Circuit has stated its agreement with the test in *Wehr. Blackwell*, 696 F.2d at 1185. Similarly, the Seventh Circuit has held that a plaintiff proves willfulness by showing that "the defendant's actions were knowing and voluntary and that he knew or reasonably should have known those actions violated of the ADEA."³⁴ *Syvock*, 665 F.2d at 156.

III.

THE ADEA AUTHORIZES RECOVERY OF MONEY DAMAGES AGAINST LABOR ORGANIZATIONS THAT DISCRIMINATE ON THE BASIS OF AGE.

The ADEA expressly prohibits labor organizations from discriminating against individuals on the basis of age. 29 U.S.C. §623(c). The Second Circuit found that ALPA had opposed the employment of flight engineers beyond age

³³ Although the Third Circuit did not explain whether the phrase "reckless disregard of consequences" referred to a defendant's knowledge of the ADEA or its knowledge that its conduct was prohibited, the Second Circuit has interpreted this standard to require a showing that the defendant knew or acted in reckless disregard as to whether its conduct was prohibited by the ADEA. See *Goodman v. Heublein, Inc.*, 645 F.2d 127, 151 (2d Cir. 1981). This interpretation of the Third Circuit's recklessness standard is consistent with the standard employed by the Seventh Circuit. *Syvock*, 665 F.2d at 154 n.5.

³⁴ Contrary to TWA's assertion (Br. at 31-32), the Seventh Circuit's test does not require specific intent. The "knew or reasonably should have known" language is a constructive knowledge standard derived from civil not criminal law.

sixty and had aided and abetted TWA's unlawful age discrimination (A-32 to A-33). A finding that labor organizations are subject to liability for damages for violating the ADEA is consistent with the legislative history and purpose of the ADEA, and with the explicit language of the statute.

A. The Legislative History and Purpose of the ADEA Favor Holding Unions Liable for Age Discrimination.

The substantive provisions of the ADEA were "derived *in haec verba* from Title VII" of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(c). *Lorillard*, 434 U.S. at 584.³⁵ The ADEA's prohibitions of discrimination on the part of labor organizations are identical to those of Title VII, and parallel the prohibitions against discrimination by employers. Compare 29 U.S.C. §623(a) and (c) with 42 U.S.C. §2000e-2(a) and (c).

In enacting the ADEA, Congress found that "the setting of arbitrary age limits regardless of potential for job performance has been a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons." 29 U.S.C. §621(a)(2). The purposes of the ADEA include "promot[ing] employment of older persons based on their ability rather than age" and "prohibit[ing] arbitrary age discrimination in employment." 29

³⁵ The ADEA is in fact a direct outgrowth of Title VII, as Congress, in enacting the 1964 statute, directed the Secretary of Labor to conduct a study of age discrimination in employment. Civil Rights Act of 1964, Pub. L. No. 88-352, §715, 78 Stat. 265 (1964). The Secretary's report, which recommended a "clear-cut and implemented Federal policy against arbitrary discrimination in employment on the basis of age," Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* 38 (1965), provided impetus for the enactment of the ADEA. See H.R. Rep. No. 805, 90th Cong., 1st Sess. 1-2 (1967); S. Rep. No. 723, 90th Cong., 1st Sess. 1-2 (1967).

U.S.C. §621(b). The ADEA and Title VII "share a common purpose, the elimination of discrimination in the workplace." *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979). Where two statutory provisions share a common purpose, identical language, and one was the source of the other, they are to be construed similarly. *Oscar Mayer*, 441 U.S. at 756; see *Northcross v. Board of Education of Memphis City Schools*, 412 U.S. 427, 428 (1973).

Courts interpreting the ADEA have looked to cases decided under Title VII for guidance, recognizing that cases under one statute "have value as precedent for cases arising under the other." *Coke v. General Adjustment Bureau*, 640 F.2d 584, 587 (5th Cir. 1981) (en banc).³⁶ It is undisputed that Title VII provides for monetary awards against labor organizations. See ALPA's Brief in Opposition to Certiorari in No. 83-997 at 29-30; see also *Russell v. American Tobacco Co.*, 528 F.2d 357, 365-66 (4th Cir. 1975), *cert. denied*, 425 U.S. 935-36 (1976); *Kaplan v. IATSE*, 525 F.2d 1354, 1360 (9th Cir. 1975).

³⁶ The Fifth Circuit in *Coke* relied on Title VII cases in construing the 180-day filing requirement in 29 U.S.C. §626(d). Other circuits also have done so. See, e.g., *Morgan v. Washington Manufacturing Co.*, 660 F.2d 710, 712 (6th Cir. 1981); *Ciccone v. Textron, Inc.*, 616 F.2d 1216 (1st Cir.), *vacated and remanded*, 449 U.S. 914 (1980); *Ewald v. Great Atlantic & Pacific Tea Co.*, 620 F.2d 1183 (6th Cir.), *vacated and remanded*, 449 U.S. 914 (1980). The latter two cases were remanded in light of *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980), a Title VII case. See also *Aronsen v. Crown Zellerbach*, 662 F.2d 584, 589 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 1183 (1983) (approving use of Title VII cases to construe the ADEA); *Loeb*, 600 F.2d at 1015-16 (approving application of Title VII burden and methods of proof to ADEA cases); *Geller*, 635 F.2d at 1032 (same); *Kentroti v. Frontier Airlines, Inc.*, 585 F.2d 967, 969 (10th Cir. 1978) (same); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 234-37 (5th Cir. 1976) (applying Title VII bona fide occupational qualification test in ADEA action).

Nothing in the ADEA's legislative history even remotely suggests that the statute's prohibitions against age discrimination by unions were intended to be mere paper tigers lacking any enforcement bite. To the contrary, the ADEA's purposes and legislative history make plain that Congress sought to strike out age-based discrimination by employers, labor organizations, and employment agencies.³⁷ A finding that labor organizations which engage in age discrimination are liable for damages is consistent with congressional intent to deter such conduct and to provide make-whole relief for aggrieved individuals.

B. The Express Language of the Statute Authorizes Monetary Relief Against Labor Organizations.

ADEA Section 7(b) provides district court jurisdiction to "grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter." 29 U.S.C. §626(b). Section 7(c) authorizes awards of "such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. §626(c).³⁸ There is no indication that Congress intended to exempt labor organizations from these broad remedial provisions. To the contrary,

³⁷ Despite the testimony of an AFL-CIO spokesman that he was "not aware of any facts that would indicate a need to forbid discriminatory practices on account of age by labor unions" and his request that the bill's provisions regarding unions be deleted, ADEA Section 4(c) was enacted as originally proposed. *Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 95 (1967). See S. 830, 90th Cong., 1st Sess. §4(c), 113 Cong. Rec. 2794 (1967).

³⁸ The words "purposes of this chapter" in both subsections is significant, referring to the ADEA's goal of eradicating age discrimination in employment. Cf. *Lorillard*, 434 U.S. at 584 (Title VII and ADEA share the aim of eliminating discrimination from the workplace); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (Title VII's purpose is to make whole victims of unlawful employment discrimination).

the remedies are available in "any action" brought by "[a]ny person aggrieved." 29 U.S.C. §626(b), (c); see *Lorillard*, 434 U.S. at 581.

ALPA's position that it is absolutely immune from liability for damages under the ADEA is based on the fact that the statute incorporates, in part, the enforcement procedures of the Fair Labor Standards Act, 29 U.S.C. §201 (FLSA).³⁹ In opting for FLSA-type enforcement, Congress rejected several alternative proposals.⁴⁰ As this Court has noted:

The bill that was ultimately enacted is something of a hybrid, reflecting, on the one hand, Congress' desire

³⁹ Although enforcement authority initially was given to the Secretary of Labor, it was transferred in July 1979 to the U.S. Equal Employment Opportunity Commission. 44 Fed. Reg. 37974 (1979).

⁴⁰ These included the following:

1. Adopting the more restrictive mechanisms of Title VII, with enforcement by the EEOC. *Lorillard*, 434 U.S. at 578; see 112 Cong. Rec. 20823-24 (1966).

2. National Labor Relations Act-type enforcement, allowing the Secretary of Labor to issue cease and desist orders enforceable in the Courts of Appeals, with no private right of action. As originally proposed, this measure authorized the issuance of complaints against labor organizations as well as employers. S. 830, 90th Cong., 1st Sess. §§7(b)(1) and 12(a), 113 Cong. Rec. 2795 (1967). See H.R. Rep. No. 805, 90th Cong., 1st Sess. 5, reprinted in [1967] U.S. Code Cong. & Ad. News 2218.

3. Making discrimination based on age unlawful under the FLSA. H.R. 13712, 89th Cong., 2d Sess., 112 Cong. Rec. 20819 (1966). See S. Rep. No. 1487, 89th Cong., 2d Sess. 78-80 (1966). Congress' rejection of this proposal is particularly significant in light of ALPA's reliance on the literal language of the FLSA and cases under the Equal Pay Act of 1963 (EPA), 29 U.S.C. §206(d). While the EPA is an amendment to the FLSA, the ADEA is a separate free-standing statute with significantly different prohibitions and remedies. See *Naton v. Bank of California*, 72 F.R.D. 550, 554 & n.9 (N.D. Cal. 1976), *aff'd in part, remanded in part*, 649 F.2d 691 (9th Cir. 1981). *Brennan v. Emerald Renovators, Inc.*, 410 F.Supp. 1057 (S.D.N.Y. 1975), cited by the court below (A-38), is thus inapposite.

to use an existing statutory scheme and a bureaucracy with which employers and employees would be familiar and, on the other hand, its dissatisfaction with some elements of each of the pre-existing schemes.

Lorillard, 434 U.S. at 578; see *EEOC v. Chrysler Corp.*, 546 F.Supp. 54, 59-60, 73-75 (E.D. Mich. 1982), *aff'd*, 733 F.2d 1183 (6th Cir. 1984).⁴¹

ADEA Section 7(b), 29 U.S.C. §626(b), provides that the ADEA "shall be enforced in accordance with the powers, remedies and procedures" of FLSA Sections 16 and 17, 29 U.S.C. §§216, 217. ALPA argues that FLSA Section 16, by its terms, applies only to employers, and Section 17 provides for injunctive relief only.⁴² From this, ALPA concludes that Congress immunized labor organizations from financial liability for age discrimination.

ADEA Section 7(b) further provides, however, that "[a]ny act prohibited under Section 4 of this Act [29 U.S.C. §623] shall be deemed to be a prohibited act under Section 15 of the Fair Labor Standards Act [29 U.S.C. §215]." 29 U.S.C. §626(b). Under FLSA Section 15(a)(2), it is unlawful for "any person" "to violate any of the provisions of Section 206 or 207 of this title . . .," which by their terms apply only to employers.⁴³ Section 15(a)(3) prohibits "any person" from "discharg[ing] or in any other

⁴¹ As noted by Senator Javits, the ADEA's principal sponsor, "the enforcement techniques of the FLSA have been incorporated by reference . . . with appropriate modifications necessary to accommodate them to the purposes of this legislation." S. Rep. No. 723, 90th Cong., 1st Sess. 13-14 (1967) (individual views of Mr. Javits).

⁴² EEOC is correct in its brief in noting that courts may grant equitable relief (including back pay against unions) to private parties under Section 17 in ADEA actions, although such relief is available under the FLSA only in actions brought by the government.

⁴³ These sections refer to the minimum wage and overtime compensation, respectively.

manner discriminat[ing] against any employee" who has filed a complaint or has initiated or testified in proceedings under or related to the FLSA.⁴⁴ The FLSA defines "person" to include "any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons." 29 U.S.C. §203(a) (emphasis added).

The prohibitions of FLSA Section 15 apply to labor organizations. *Bowe v. Judson C. Burns, Inc.*, 137 F.2d 37, 38-39 (3d Cir. 1943). See *Meek v. United States*, 136 F.2d 679, 680 (6th Cir. 1943) ("[T]he differentiation between the prohibitions in other sections of the [FLSA] directed to 'employer,' and those [in §15] to 'any person,' is significant of the intent of Congress"); *Wirtz v. Ross Packaging Co.*, 307 F.2d 549, 550 (5th Cir. 1966) ("The prohibitions of Section 15(a)(3) are . . . unlimited, for they are directed to 'any person.'").

Violations of FLSA Section 15(a)(2) by any person are therefore deemed "employer" violations of FLSA Sections 6 or 7 and are actionable under FLSA Section 16(b), which provides that "any employer who violates the provisions of [29 U.S.C. §§206, 207] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation. . . ." Bringing the statutory construction full circle, the ADEA provides that "[a]mounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title. . . ." 29 U.S.C. §626(b).

⁴⁴ This FLSA provision is similar to ADEA Section 4(d), which prohibits employers, employment agencies, and labor organizations from discriminating against individuals who oppose practices outlawed by the ADEA or who have filed charges, testified, assisted, or participated in an investigation, proceeding, or litigation under the ADEA. 29 U.S.C. §623(d).

In summary, amounts owing to individuals aggrieved under the ADEA are deemed minimum wage or overtime compensation. It is unlawful under FLSA Section 15 for any person to fail to pay the minimum wage or overtime. Any violation of ADEA Section 4, including unlawful conduct by labor organizations, also violates FLSA Section 15. Thus, any person, including a union, whose actions violate the prohibitions of ADEA Section 4 is liable to the aggrieved party for amounts owing.

ALPA's reliance upon the literal language of FLSA Sections 6 and 7 ("no employer") would abrogate the sentence in ADEA Section 7(b) which provides that Section 4 violations are considered violations of FLSA Section 15. It is elementary that where possible, a statute should not be construed in such a way as to make any of its provisions superfluous or redundant. *See, e.g. Patagonia Corp. v. Board of Governors of the Federal Reserve System*, 517 F.2d 803, 813 (9th Cir. 1975); 2A C. Sands, *Sutherland Statutory Construction* §§46.06, 46.07 (4th ed. 1973); *cf. Oscar Mayer*, 441 U.S. at 757 (rejecting an interpretation of ADEA Section 14(b) which would strip it of all meaning). By providing that violations of ADEA Section 4 are also violations of FLSA Section 15, Congress intended that all persons subject to the ADEA's prohibitions would be liable for legal and equitable relief under ADEA Section 7. *See EEOC v. ALPA*, 489 F.Supp. 1003, 1009 (D. Minn. 1980), *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981) (labor organization liable); *Brennan v. Hughes Personnel, Inc.*, 8 Empl. Prac. Dec. [CCH] ¶9571 (W.D. Ky. 1974) (employment agency liable).

The analysis in *Neuman v. Northwest Airlines, Inc.*, 28 Fair Empl. Prac. Cas. [BNA] 1488 (N.D. Ill. 1982), cited by the court below (A-38), is flawed in several respects. First, the court ignored the ADEA's cross-reference to FLSA Section 15, as discussed above. Next, the court relied solely on cases decided under the Equal Pay Act,

which is an amendment to the FLSA. *See* note 40, *supra*. The ADEA, in contrast, is a separate statute with broader coverage, prohibitions, and relief. Finally, the *Neuman* court incorrectly assumed that the word "remedies" in ADEA Section 7(b), 29 U.S.C. §626(b), refers to the parties from whom relief may be sought. This distorts the traditional meaning of the word as simply the procedure by which relief is obtained, without reference to the parties against whom it may be sought. *See Chelentis v. Luckenbach Steamship Co.*, 247 U.S. 372, 384 (1918) ("a remedy is the means employed to enforce a right or redress an injury").

C. ALPA Willfully Violated the ADEA.

The Second Circuit held that ALPA's conduct violated ADEA Section 4(c)(3), 29 U.S.C. §623(c)(3).⁴⁵ The court found that "ALPA actively campaigned to persuade TWA to retain its age-60 retirement policy for all flight deck positions, opposed TWA's unilateral action in August 1978 to attempt partial compliance with the ADEA and induced TWA to impose further discriminatory restrictions on captains seeking to downbid to flight engineer status." (A-32 to A-33).⁴⁶ Further, the court noted that ALPA's declara-

⁴⁵ Both the Thurston respondents and the EEOC alleged in their complaints that ALPA had willfully violated 29 U.S.C. §623(c)(1), (2) and (3). (J.A. 58, 66-67, 92, 95-96). The Thurston respondents also alleged a willful violation of 29 U.S.C. §623(d) by ALPA. The facts support findings of liability under all of these provisions.

⁴⁶ ALPA contends that it is not liable to the Thurston respondents, based on the reference to "EEOC plaintiffs" on A-33. It is clear, however, from the discussion of ALPA's liability (A-31 to A-33) that the court found ALPA's unlawful actions to have harmed both groups of plaintiffs. *See* A-31 at n.18. Furthermore, the court entered judgment for appellants against ALPA and directed that each plaintiff be awarded such relief as he was entitled to against each defendant (A-35).

tory judgment action was an attempt "to use the ADEA to cut off the rights of the older flight engineers" (A-20) and that "the purpose of the ADEA would be frustrated by ALPA's declaratory action" (*id.*).

The record discloses a willful course of conduct by ALPA, seeking to deprive its most senior members of up to ten years of productive employment⁴⁷ and to delay implementation of the ADEA as long as possible. (pp. 11-13, *supra*). The ADEA's penalties for willful misconduct were fully appreciated by ALPA. Just days after TWA announced its change in policy, ALPA's president and outside counsel expressed the opinion that "if we deny a man the opportunity to work beyond age 60 when the Company has offered him this opportunity, ALPA would quite likely be liable for a considerable amount of money." (R. 102, Ex. 37 at 4).

In addition to its actions to prevent all service beyond age sixty,⁴⁸ ALPA also engaged in activity to deprive and

⁴⁷ Respondents Thurston, Clark, and Parkhill had 36, 34, and 33 years of seniority, respectively, at the time of their involuntary retirements (J.A. 919-21, 911-12, 903-05).

⁴⁸ The conduct at issue here is consistent with ALPA's opposition to service after age sixty on other airlines. ALPA has been a party defendant in three other cases in which flight deck crewmembers have sought to continue their employment. *Ferrara v. Braniff Airways, Inc.*, No. CA 3-80-1273-R (N.D. Tex.) (consent decrees entered September 30, 1983); *Penton v. The Flying Tiger Line, Inc.*, No. CV-81-4419-RJK (C.D. Cal.) (consent decree entered June 20, 1984); *Neuman v. Northwest Airlines, Inc.*, No. 79 C 1570 (N.D. Ill.) (consent decree entered April 5, 1983). ALPA also has been a third-party defendant in four other cases. *Worley v. Continental Air Lines, Inc.*, No. CV-80-1110-WMB (C.D. Cal.) (consent decree entered December 27, 1982), *appeal pending*, Nos. 83-5594 *et al.* (9th Cir.); *Monroe v. United Air Lines, Inc.*, 31 Empl. Prac. Dec. [CCH] ¶133,330, 33,331 and 32 Empl. Prac. Dec. ¶133,658 (N.D. Ill. 1983), *rev'd and remanded*, Nos. 83-1245 *et al.* (7th Cir. May 30, 1984); *Stone v. Western*, 544 F. Supp. 33; *Richardson v. Alaska Airlines, Inc.*, No. C81-974V (W.D. Wash.) (consent decree entered Nov. 1, 1982), *appeal pending*, No. 83-4021 (9th Cir.).

limit the employment opportunities of its oldest members. Immediately after TWA announced that it would employ age sixty flight engineers, ALPA submitted its discriminatory proposals to modify the pilot contract (pp. 12-13, *supra*). One of ALPA's proposals was that, in the event of a furlough, flight engineers over sixty would be the first crewmembers laid off, "starting with the most senior pilot" of that group. These crewmembers would be recalled only after the other furloughees, who would be among the most junior crewmembers at TWA (R. 102, Ex. 36 (§17(A)(3))). ALPA also prevailed upon TWA to impose restrictions on age sixty downbidders to make it more difficult for them to achieve flight engineer status (A-11 to A-12). Respondents are entitled to full statutory relief against ALPA, including money damages, for the union's willful violation of the ADEA.

CONCLUSION

For the foregoing reasons, the Second Circuit's decision that TWA and ALPA violated the ADEA and that the violation was willful should be affirmed. The portion of

the decision holding ALPA not liable for damages should be reversed.

Respectfully submitted,

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July 1984

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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,

Petitioner,

—v.—

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL,
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIR LINE
PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

—v.—

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL,
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AIRLINES, INC.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF TRANS WORLD AIRLINES, INC.

Petitioner in No. 83-997

Respondent in No. 83-1325

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REPLY BRIEF OF TRANS WORLD AIRLINES, INC.

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INTRODUCTION

The briefs by the other parties highlight the difficult situation which confronted TWA when it sought to comply with the ADEA amendments. On the one hand, the *Thurston* plaintiffs and the EEOC contend that TWA and ALPA are jointly liable for a policy which went further in accommodating downbidding Captains than any other trunk airline.¹ On the other hand, ALPA says that neither it nor TWA should be liable but that if liability is jointly imposed, then TWA alone should be stuck with total monetary liability. In the final analysis, Judge Van Graafeiland's observation below that TWA is really worthy "of receiving commendation for what it has done" (A-36) is fully supported by the record.

I. THE PLAINTIFFS HAVE FAILED TO PROVE THAT TWA'S AGE 60 POLICY WAS UNLAWFUL

A. The Undisputed Facts Show How TWA Has Satisfied the ADEA

Stripped of the plaintiffs' rhetoric, this is not a complex case. This Court need only focus on certain undisputed facts in its examination of TWA's "age 60" policy:

1. There is an FAA rule which prohibits Captains and First Officers from serving in those positions beyond age 60, and that rule is subject to the BFOQ provision of the ADEA (A-7 to A-8);

¹ As noted in TWA's opening brief (p. 8 n.8), there is a threshold question whether the EEOC has the authority to enforce the ADEA in view of *INS v. Chadha*, ___ U.S. ___, 103 S. Ct. 2764 (1983). The issue is now of heightened importance because the Second Circuit, from which this case is appealed, has recently ruled that *Chadha* bars the EEOC from enforcing the ADEA. *EEOC v. CBS, Inc.*, ___ F.2d ___, 35 FEP Cases 1127 (2d Cir. 1984). While this does not moot the claims of the private plaintiffs (and therefore does not moot the issues in this case), there is the obvious question of the EEOC's status to represent anyone here. TWA reserves all rights in this regard in the event of remand.

2. The bidding procedures of the TWA Working Agreement are the heart of the contractual seniority system and serve as the basic mechanism in deploying the pilot work force (J.A. 185, ¶ 3);
3. In order for a bid to be awarded, there must be a vacancy (TWA Op. Br., pp. 9-10);
4. The plaintiffs "could not establish that there were flight engineer vacancies at the time they applied to transfer" (A-23);
5. Unable or unwilling to change status, the plaintiffs reached age 60 as Captains, a position in which they no longer could lawfully perform (A-10);
6. "Most of the 70 captains and first officers who have downbid for flight engineer positions successfully obtained that status before reaching 60" (A-10). In fact, it is "unrebutted" that 83% succeeded in that regard (A-61 n.8);²
7. In a few situations unrelated to age, a vacancy (and the award of a bid) is not required in order to change status (TWA Op. Br., pp. 12-13);

² As the EEOC concedes in its brief (p.17), only a "handful" of Captains were not awarded a Flight Engineer vacancy. The *Thurston* plaintiffs also do not challenge the accuracy of TWA's 83% overall success rate, but they do now try to distort TWA's data by making their own analysis limited to the transitional year of 1978 (*Th. Br.*, p. 3). However, that is contrary to this Court's decision in *Hazelwood School District v. United States*, 433 U.S. 299 (1977), to examine statistical data in employment discrimination cases on the basis of "cumulative results." *Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30*, 489 F. Supp. 282, 308 (N.D. Cal. 1980), *aff'd*, 694 F.2d 531 (9th Cir. 1982). See generally Schlei and Grossman, *Employment Discrimination Law* 1364-65 (2d ed. 1983).

8. TWA was the only trunk airline to voluntarily permit Captains to downbid and serve past age 60 (J.A. 487-88; 492, No. 12).³

In view of these undisputed facts, the liability issue to be determined is whether the ADEA requires TWA to make the same accommodation for an age-related reason as it does for a non-age reason, or whether such a requirement is, as the dissent notes below, "like comparing apples with oranges" (A-35 to A-36). Plaintiffs do not, and cannot, dispute the fact that the few non-age accommodations in the Working Agreement were just as available to them. Nevertheless, they want the same accommodations simply because of their age. TWA's policy was in full compliance with the law because the ADEA does not mandate that type of preferential treatment. Moreover, TWA's effort to treat everyone equally was based on legitimate reasons other than age and was the result of a bona fide seniority system (TWA Op. Br., pp. 17-30).

B. The Plaintiffs Ignore the Importance of the Need for a Vacancy in TWA's Seniority System

The EEOC contends that the absence of a Flight Engineer vacancy "simply begs the question" at issue (EEOC Br., p. 19 n.26). However, this Court has recognized that "the absence of a vacancy in the job sought" can be fatal to establishing a prima facie case. *Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977). Even where there has been discrimination, an adversely affected employee "is not automatically entitled to have a non-minority employee laid off to make room for him.

³ Although they did not do so before the Second Circuit, the *Thurston* plaintiffs now seek to belittle (but do not dispute) TWA's performance in this regard (*Th. Br.*, pp. 3-4). However, they cannot evade their own admission that as of March 23, 1982, "TWA [was] the only trunk airline which has, absent a court order, permitted Captains to downbid to Flight Engineer and serve in that status beyond age 60" (J.A. 487-88). Significantly, all the consent decrees to which they now cite in their brief (p. 3 n.2) are dated no earlier than December 27, 1982—over four years *after* TWA adopted its "age 60" policy in August 1978.

He may have to wait until a vacancy occurs," Firefighters Local Union No. 1784 v. Stotts, ___ U.S. ___, 104 S. Ct. 2576, 2588 (1984).⁴

Here, the undisputed facts show that when there have been vacancies, downbidding Captains have exercised their seniority rights to obtain Flight Engineer positions. Indeed, none of the plaintiffs challenges the bona fides of TWA's seniority system. While the plaintiffs dismiss the applicability of TWA's pilot seniority system to this case (*Th. Br.*, p. 21; EEOC Br., p. 22), the fact remains that plaintiffs could not become Flight Engineers under the Working Agreement without a vacancy.⁵

Nothing in law suggests that TWA should have so altered its seniority system for plaintiffs. As this Court recently reiterated in *Firefighters, supra*, 104 S. Ct. at 2583-84 n.4, "[s]eniority has traditionally been, and continues to be, a matter of great

⁴ Emphasis in quotations is added unless otherwise noted.

Counsel for the *Thurston* plaintiffs has himself recognized that a lack of a vacancy is a legitimate and common explanation for an individual's failure to obtain a job. See Br. for Resp. in Opp. to Pet. for Cert. in *Western Air Lines, Inc. v. Criswell*, No. 83-1545, pp. 7-8 (stating in another "age 60" case that pilot "Criswell's bid was denied, not because of a lack of openings or any other usual business reason").

⁵ Plaintiffs also suggest that this Court should not consider TWA's reliance on its seniority system since it was not specifically cited as one of the "questions presented" in TWA's petition for certiorari (*Th. Br.*, p. 20; EEOC Br., p. 22 n.28). However, Rules 15.1(a) and 21.1(a) of this Court fully recognize that the "questions presented" for review "will be deemed to comprise every subsidiary question fairly included therein."

In this regard, the EEOC conceded in its memorandum in opposition to ALPA's cross-petition for certiorari in No. 83-1325 (p.2) that ALPA's "BFOQ" issue "merely states" just such a "subsidiary issue" to TWA's petition. If that is true for ALPA's "BFOQ" question, then it is equally true for TWA's reliance on its seniority system that was discussed by both courts below (A-25 to A-26, A-57) and noted in TWA's petition for certiorari (p.20 n.*). Accord, e.g., *Procurier v. Navarette*, 434 U.S. 555, 559-60 n.6 (1978); *Peters v. Kiff*, 407 U.S. 493, 495 (1972).

concern to American workers." Those workers, including TWA's pilot force, develop legitimate seniority expectations which are honored by adherence to the bona fide seniority provisions of the Working Agreement. If TWA "does not vigorously defend the implementation of its seniority system, it will have to cope with deterioration in employee morale, labor unrest, and reduced productivity." *Firefighters, supra*, 104 S. Ct. at 2591 (O'Connor, J., concurring).

TWA's policy was an effort to accommodate the requirements of both the ADEA and the Railway Labor Act (TWA Op. Br., p. 21 n.24).⁶ It is well-established that courts are "generally less competent than employers to restructure business practices," *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 (1978), and that is particularly true where the potential "disruption of the existing seniority system [could] violate a collective-bargaining agreement, with all that such a violation entails for the employer's labor relations." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 229 (1982).

⁶ In their briefs, plaintiffs continue to make light of TWA's clear statutory obligation under Section 6 of the Railway Labor Act ("RLA") to maintain the same "rates of pay, rules, or working conditions" (45 U.S.C. § 156). The *Thurston* plaintiffs ignore this issue completely, and the EEOC's attempted rebuttal (EEOC Br., p. 25 n.31) ignores the fact that the Working Agreement did not contemplate downbidding after age 60. Indeed, the EEOC concedes "there is no claim that any of the pilots here involved have transfer rights under the express contractual provisions of the Working Agreement." (EEOC Br., p.17 n.25).

To have adopted the type of "remedial" relief suggested by the EEOC would have subjected TWA to obvious labor grievances for violating the Working Agreement, and the forum to hear those grievances, the TWA system board of adjustment, is by law limited in its jurisdiction to the Working Agreement. See RLA, Section 204, 45 U.S.C. § 184; *De La Rosa Sanchez v. Eastern Airlines, Inc.*, 574 F.2d 29, 31-32 (1st Cir. 1978), and cases cited therein. As it was, TWA's "age 60" policy prompted not only ALPA's lawsuit (J.A. 108-15), but it also prompted a separate lawsuit alleging RLA violations by a group of furloughed Flight Engineers. See *Cafferty v. TWA*, 488 F. Supp. 1076 (W.D. Mo. 1980).

C. The Application of TWA's "Age 60" Policy Has Been Nondiscriminatory

In an effort to divert this Court's attention from TWA's "unrebutted" 83% success rate for downbidding Captains (A-61 n.8) and its 100% success rate for "career" Flight Engineers, the plaintiffs have sought to emphasize in their briefs the period of time when TWA was seeking to formulate its "age 60" policy (*Th. Br.*, pp. 9-11; EEOC Br., pp. 4-6). During that period, there were obvious disagreements within the Company as to what the new law required, and these disparate views were strongly held by the various individuals involved.⁷

However, the *ultimate* Company policy permitted service by Captains beyond age 60 "in accordance with the seniority and bidding procedures of the Working Agreement" (A-9), and this was at a time when no other airline was allowing *any* Captains to downbid and serve beyond age 60 (J.A. 561-62). The Second Circuit recognized that "TWA *immediately* reinstated those who had been in flight engineer status on their 60th birthdays and had been retired after April 6, 1978." (A-9).⁸ The Second

⁷ It should be noted that many of the record references now cited by the plaintiffs (particularly the *Thurston* plaintiffs) were previously so insignificant to any issue in this case that they were not even designated by anyone to be part of the Joint Appendix. Indeed, the Second Circuit viewed the period when the Company was formulating its policy to be so insignificant that it devoted only one sentence of its entire decision to this period, and that sentence only related to TWA's failure "to agree with ALPA on a revision of TWA's retirement program" (A-9). It is only now that this period has magically become so important to the plaintiffs.

⁸ Included in those reinstated was an International Relief Officer ("IRO") who was viewed as being in the Flight Engineer status for the purposes of TWA's "age 60" policy (J.A. 1023-24). This is criticized by the plaintiffs (*Th. Br.*, p. 6; EEOC Br., p. 7 n.11), but IRO's enjoy a special contractual "prior right" (not based on age) to the Flight Engineer seat (J.A. 609, Art. 1; 351-52, ¶ 5.A) while none of the plaintiffs is covered by the 1962 Agreement providing for such "prior rights" (J.A. 616; 492, No. 11). Moreover, TWA is bound by an arbitrator's ruling that an IRO "assumes the position of, and performs the duties of, the Flight Engineer." (J.A. 607). See also J.A. 208-14.

Circuit also noted that "[m]ost of the 70 captains and first officers who have downbid for flight engineer positions successfully obtained that status before reaching 60." (A-10). In addition, TWA has instituted a special program of guidance for Captains approaching age 60 whereby such Captains specifically meet with a Company representative to discuss the options available to them. A "Memo to File" is prepared after the meeting which states that the individual Captain is "thoroughly briefed as to the responsibilities associated with his transition to a Flight Engineer status." (J.A. 481-83). Those Captains who wish to serve beyond age 60 sign a letter expressing that intent (J.A. 484-86).

In view of this undisputed record,⁹ it would be highly ironic to hold TWA liable for age discrimination when two other major carriers, American Airlines and Delta Air Lines, have successfully defended on safety grounds their "age 60" policies of allowing *no* downbidding Captains beyond age 60. See *Johnson v. American Airlines, Inc.*, 18 (CCH) Av. Cas. 17,177 (N.D. Tex. 1983), *appeal pending*, No. 83-1610 (5th Cir.); *Iervolino v. Delta Air Lines, Inc.*, No. C81-2327A (N.D. Ga. June 22, 1984).¹⁰ Like American and Delta, TWA has "to

⁹ The *Thurston* plaintiffs (Br., pp. 19-20) seek to disparage TWA's performance by relying on *Connecticut v. Teal*, 457 U.S. 440 (1982). However, *Teal* fully recognized that where there is a question of intent, an employer's "nondiscriminatory 'bottom line'" (such as TWA's 83% success rate) can "assist an employer in rebutting the inference that particular action [e.g., TWA's policy] had been intentionally discriminatory" (*id.* at 454).

¹⁰ See also *Monroe v. United Air Lines, Inc.*, 736 F.2d 394 (7th Cir. 1984), where the Seventh Circuit recently reversed and remanded for a new trial on whether United's policy of allowing *no one* to serve beyond age 60 was permissible under the ADEA. Aside from TWA, there is now only one other carrier, Western Air Lines, which is subject to a finding of age discrimination for its "age 60" policy. See *Criswell v. Western Air Lines, Inc.*, 514 F. Supp. 384 (C.D. Cal. 1981), *aff'd*, 709 F.2d 544 (9th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3722 (U.S. March 16, 1984) (No. 83-1545). In contrast to TWA, Western's "age 60" policy prohibited anyone from serving in the cockpit beyond age 60.

perform [its] services with the highest possible degree of safety" under Section 601(b) of the Federal Aviation Act (49 U.S.C. § 1421(b)). The fact that TWA's Vice President of Flight Operations also felt strongly for safety reasons about former Captains in the cockpit beyond age 60 is perfectly understandable in the context of the uncertain status of the law and TWA's duty to comply with the Federal Aviation Act.¹¹

II. THE STANDARD FOR WILLFULNESS ADVOCATED BY THE PLAINTIFFS WOULD NULLIFY THE CLEAR CONGRESSIONAL INTENT OF TWO-TIERED LIABILITY UNDER THE ADEA

Both the *Thurston* plaintiffs and the EEOC state that the proper standard for "willfulness" under the ADEA requires only "that the defendant knew or should have known its actions were governed by the ADEA." (*Th. Br.*, p. 25; EEOC Br., p. 32). Under such a standard, any employer which was *aware* that the ADEA covered its employees would be automatically subject to double damages once there was a finding of liability. That would completely emasculate the ADEA's two-tiered standard of liability which Congress clearly established (TWA Op. Br., pp. 31-32).

Congress expressly chose language in Section 7(b) of the ADEA indicating that liquidated damages were to be the exception and not the rule: "*Provided*, That liquidated damages shall be payable *only* in cases of *willful* violations of this Act." (29 U.S.C. § 626(b)). Accord, *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). By ignoring the word "only," the plaintiffs have thereby forgotten the cardinal principle that a statute "'ought . . . to be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant.'" *United States v. Campos-Serrano*, 404 U.S. 293, 301 n.14 (1971).

¹¹ See J.A. 1002; R. 165, pp. 47-48 (J.A. 19). The Company's ultimate policy (J.A. 425) was adopted with the concurrence of both Flight Operations (Mr. Frankum) and Labor Relations (Mr. Crombie), and the actual text of the policy was written by Mr. Hilly of Labor Relations (J.A. 1031-32).

The recent Second Circuit opinion in *Haskell v. Kaman Corp.*, ___ F.2d ___, 35 FEP Cases 941 (2d Cir. 1984), shows the folly of the slight willfulness standard urged by the *Thurston* plaintiffs and the EEOC. Writing for the panel in *Haskell*, Judge Mansfield (the author of the majority opinion here) reaffirmed the holding in *ALPA* that "a plaintiff 'need not prove a specific intent to violate the ADEA' " for willfulness purposes (*id.* at 947). Instead, he said:

"[A]lthough there is a split of authority on the extent of knowledge on the part of the employer required to establish willfulness, we believe that a plaintiff must at least show that the employer was aware that its conduct was governed by the ADEA . . ." (*id.* at 947-48).

Obviously, such a minimal standard almost mandates double damages, for virtually any employer is going to be "aware that its conduct was governed by the ADEA."¹²

The *Haskell* opinion is also of significance since it demonstrates the equally slight showing required to find willfulness under the test of an employer acting in "reckless disregard":

"[T]he failure of such an employer to investigate the matter [*i.e.*, whether the conduct was governed by the ADEA] . . . would amount to reckless disregard for whether its conduct violated the Act." (*Id.* at 948).

¹² The EEOC itself recognizes that "only in the rarest cases will employers be deemed to be reasonably unaware of the ADEA. As the court below noted (Pet. App. A34), the Act itself requires employers to post notices of its applicability. 29 U.S.C. § 627." (EEOC Br., p. 39 n.45).

In this regard, the Tenth Circuit has recently adopted the "aware that conduct is governed by the ADEA" test for willfulness. *EEOC v. Prudential Fed. Sav. and Loan Ass'n*, ___ F.2d ___, 35 FEP Cases 783 (10th Cir. 1984). Its factual finding further shows how such a test dilutes the meaning of "willful":

"The record contains testimony by Prudential executives and members of the board demonstrating that the company in fact knew its employees were protected by the ADEA . . . [W]e conclude as a matter of law that Prudential's conduct . . . constituted a willful violation within the meaning of the ADEA." (*Id.* at 790).

In view of such language, the "reckless disregard" test urged by the *Thurston* plaintiffs (*Th. Br.*, p. 25) hardly begins to probe the ultimate question of discriminatory animus on the part of the employer. If all that is required for "reckless disregard" is a showing that an employer did not "investigate" whether its conduct "was governed by the ADEA," "reckless disregard" is almost automatic.

Accordingly, neither the "aware of conduct governed by the ADEA" nor a "reckless disregard" test begins to answer the question whether an employer has acted "willfully." The most logical test, and the one that best effectuates the plain language of the statute and Congressional intent, is the one requiring proof of specific intent to discriminate in violation of the ADEA (*TWA Op. Br.*, pp. 30-37).¹³

III. THE PROCEDURAL ARGUMENTS RAISED BY ALPA ARE WITHOUT MERIT AND SHOULD NOT DETER A HOLDING THAT A UNION CAN BE MONETARILY LIABLE UNDER THE ADEA

In its brief as respondent, ALPA has raised a series of procedural arguments which, it claims, precludes this Court's consideration of a union's monetary liability under the ADEA. These arguments are meritless and should not deter this Court from holding that a union can be liable for monetary relief.

ALPA initially charges that TWA lacks "standing" to raise the question of a union's monetary liability since TWA is not one of the plaintiffs (*ALPA Resp. Br.*, pp. 7-8).¹⁴ In order to have standing, this Court requires that a petitioner have a "personal stake in the outcome of the controversy" consist-

¹³ See also *amicus* briefs of U.S. Chamber of Commerce, pp. 6-10; and the Equal Employment Advisory Council, pp. 8-22.

¹⁴ It is significant to note that when ALPA opposed TWA's petition for certiorari on the question of a union's monetary liability under the ADEA, it never questioned TWA's standing. In any event, the issue is properly before this Court because the plaintiffs surely have standing on this issue and have raised it. That is all that is necessary. See, *e.g.*, *Director, OWCP v. Perini North River Assocs.*, 459 U.S. 297, 302-05 (1983).

ing of a "distinct and palpable injury," *Larson v. Valente*, 456 U.S. 228, 238-39 (1982). Clearly, TWA has satisfied that threshold. Unless the decision below is reversed, TWA is stuck with total monetary liability under the ADEA even though both employer and union defendants were found liable. If that inequity and resulting financial cost to TWA is not a "distinct and palpable injury," then nothing is.¹⁵

ALPA also argues that TWA is barred from raising the question of union liability because TWA had never raised this issue prior to its petition for certiorari (ALPA Resp. Br., pp. 9-10). Of course, TWA had not previously raised the question because it was not an issue until *after* the Second Circuit had denied petitions for rehearing (A-40 to A-43) and released its "Errata Sheet" (A-37 to A-39) from which there was no appeal except to this Court.

Previously, the district court had granted TWA's motion for summary judgment, and therefore the question of union liability was never reached. At the appellate level, the Second

¹⁵ ALPA also raises the bizarre argument that the Second Circuit's finding of union liability was intended to apply only to the plaintiffs represented by the EEOC and not to the private plaintiffs (ALPA Resp. Br., p. 4). The basis for ALPA's argument is that the Second Circuit's decision used at one point the words "EEOC plaintiffs," and ALPA contends this means that the Second Circuit therefore did not intend to include the private plaintiffs when it imposed liability. Of course, ALPA gives no credible explanation why the Second Circuit would make such a distinction when it spends three pages of its decision detailing what it perceives as ALPA's culpability here (A-31 to A-33). See also *Thurston* brief, p. 41 n.46. Clearly, ALPA's disingenuous footnote on this subject is inadequate as an explanation (ALPA Resp. Br., p. 4 n.2).

Equally bizarre is ALPA's argument that since the EEOC did not file a cross-petition for certiorari, the issue cannot now be raised because the EEOC "may not . . . seek to enlarge its rights on appeal." (ALPA Resp. Br., p. 8). Obviously, none of the plaintiffs had to file a cross-petition since their rights were not being enlarged beyond what TWA had raised as the issue in its initial petition. Accordingly, the cases which ALPA cites in support of its argument (ALPA Resp. Br., p. 8 n.5) are inapposite.

Circuit initially agreed that there should be joint monetary liability (A-34 to A-35). It was only after the Second Circuit completely reversed itself through the vehicle of its "Errata Sheet" (A-37 to A-39) that TWA had any reason to raise the issue.¹⁶

Finally, ALPA contends that TWA cannot raise the issue of union liability because that would be an attempt at seeking contribution which, ALPA says, is barred by this Court's decision in *Northwest Airlines, Inc. v. TWU*, 451 U.S. 77 (1981) (ALPA Resp. Br., pp. 10-16). However, the question of contribution is irrelevant to whether a *co-defendant* union can be held liable for monetary relief under the ADEA. See, e.g., *id.* at 88-89 n.20 and the discussion in the *amicus* brief (p. 23 n.16) by the Equal Employment Advisory Council ("EEAC"). Indeed, even ALPA concedes in its respondent brief (p. 11) that "*Northwest Airlines* was a separate lawsuit for contribution" rather than a case involving co-defendants.

In the event of liability, this Court should therefore face the important substantive question which all the parties but ALPA have raised about union liability under the ADEA.¹⁷ In that regard, it should carefully consider the fact that ALPA and the *amicus* AFL-CIO are unable to cite to one instance in the ADEA's legislative history which would suggest that Congress intended to exclude unions from monetary liability under the ADEA. Accord, *EEOC v. ALPA*, 489 F. Supp. 1003, 1009 n.5

¹⁶ The cases cited by ALPA in its brief (pp. 9-10) are therefore inapposite since they pertain to situations where an appellate court had not "considered" the question at all. Here, the Second Circuit actually examined the issue not just once but *twice*. That is certainly having the question "considered by the Court of Appeals," *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

¹⁷ See TWA Opening Brief, pp. 38-44; *Thurston* brief, pp. 33-43; EEOC brief, pp. 41-48. See also *amicus* brief of U.S. Chamber of Commerce, pp. 10-14; *amicus* brief of EEAC, pp. 22-26. As the *Thurston* and EEOC briefs readily show, it is not the case that "[p]laintiffs here have abandoned their claim for damages against ALPA" (ALPA Resp. Br., p. 13 n.14).

(D. Minn. 1980), *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981).

The purposes of the ADEA would obviously be emasculated by a wooden adherence to the remedies of the Fair Labor Standards Act ("FLSA") when the purposes of that statute differ markedly from the ADEA (TWA Op. Br., pp. 40-41).¹⁸ It must be remembered that Section 7(b) of the ADEA expressly "grant[s] such legal or equitable relief as may be appropriate to effectuate the purposes of *this* Act," not the FLSA. Such statutory language, the policy reasons, the ADEA's legislative history, the provisions in other labor statutes and sound logic compel only one result: a union should be liable for monetary damages under the ADEA to the extent of its culpability.

Respectfully submitted,

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¹⁸ See also *Hodgson v. Sagner, Inc.*, 326 F. Supp. 371, 373-74 (D. Md. 1971), *aff'd sub nom. Hodgson v. Baltimore Regional Joint Bd.*, 462 F.2d 180 (4th Cir. 1972), where a co-defendant union was held liable for monetary damages under the Equal Pay Act, 29 U.S.C. § 206(d), which is part of the FLSA.

(18) (17)
Nos. 83-997 and 83-1325

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In the Supreme Court of the United States

OCTOBER TERM, 1984

TRANS WORLD AIRLINES, INC., PETITIONER

v.

HAROLD H. THURSTON, ET AL.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
PETITIONER

v.

HAROLD H. THURSTON, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**REPLY MEMORANDUM FOR THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

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In the Supreme Court of the United States

OCTOBER TERM, 1984

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TRANS WORLD AIRLINES, INC., PETITIONER

v.

HAROLD H. THURSTON, ET AL.

No. 83-1325

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PETITIONER

v.

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*ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT*

**REPLY MEMORANDUM FOR THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

1. The Union, in its brief as respondent in No. 83-997, argues that this Court should not consider TWA's claim that the union is liable for damages

under the ADEA because EEOC and the private respondents have not cross-petitioned on that issue, and TWA has no right of contribution against the Union.¹

a. This suit was brought by EEOC and the private respondents against both TWA and ALPA, seeking damages against them both. When the court of appeals reversed the district court's dismissal of that suit, it originally held that "appellants are entitled to recover back pay, an equitable remedy, against the union" (Pet. App. A34), and remanded the case to the district court with "directions to enter judgment for appellants against TWA and ALPA and to award to each plaintiff such amount as may be found due against each defendant in accordance with this opinion" (Pet. App. A35). On ALPA's petition for rehearing, the court of appeals amended this language (Pet. App. A38-A39), leaving TWA solely liable for all the damages found. This amendment clearly enhanced the consequences of TWA's liability beyond the exposure it had under the theory on which suit was originally brought and the original decision of the court of appeals. If TWA prevails in this Court, the district court on remand may apportion the total liability between ALPA and TWA; if TWA does not

¹ The petition for a writ of certiorari in No. 83-997 was granted on February 27, 1984; the cross petition (No. 83-1325) was not granted until April 2, 1984. In this unusual situation (see Sup. Ct. R. 22.4), the briefing schedule has been as follows: TWA filed its opening brief in No. 83-997 on May 17, 1984, and ALPA filed its opening brief in No. 83-1325 on May 31, 1984. We responded to these briefs in our main brief filed on July 6, 1984. On the same day, ALPA filed its main brief in response in No. 83-997, in which it for the first time presented its views on the union liability issue. Since we did not have the opportunity to address these views in our earlier filed brief, we do so here.

prevail, it is solely liable. As a practical matter, therefore, TWA has a significant financial interest in the question it has presented. This interest is, we submit, sufficient to permit TWA to raise the question in its petition for certiorari. See *Larson v. Valente*, 456 U.S. 228, 239 (1982); *Warth v. Seldin*, 422 U.S. 490, 501 (1975). It had no reason to urge it before the court of appeals altered its judgment on rehearing. *Bowen v. United States Postal Service*, 459 U.S. 212, 217-218 n.7 (1983).²

² It is also significant that both EEOC and the private plaintiffs, who clearly have an interest in this issue, support TWA's position on this question on the merits. Cf. *Director, Office of Workers' Compensation Programs v. Perini North River Associates*, 459 U.S. 297, 304-305 (1983); *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 783-784 n.14 (1980).

The procedural posture of *Perini* is very similar to that here. The Director of the Office of Worker's Compensation Programs, U.S. Department of Labor, petitioned for review of the Second Circuit's decision that an injured employee of *Perini* was not entitled to compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* *Perini* challenged the Director's standing to raise the issue, asserting that he was not aggrieved by the court's ruling. However, this Court ruled that the presence of Churchill, the injured worker, as a party respondent and his filing of a brief in this Court urging reversal made the question of the Director's standing immaterial (459 U.S. at 304-305):

The Director's petition, filed under 28 U.S.C. § 1254(1), brings Churchill before this Court, and there is no doubt that Churchill, as the injured employee, has a sufficient interest in this question to give him standing to urge our consideration of the merits of the Second Circuit decision.

Similarly, TWA's petition brought EEOC and the private plaintiffs before this Court as respondents, and these respondents have joined TWA in urging reversal of the Second Circuit's immunization of ALPA from monetary liability. Plain-

b. This is not a situation like *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77 (1981), in which, after the airline was found liable for discrimination against its female employees in *Laffey v. Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C.), aff'd, 567 F.2d 429 (D.C. Cir. 1973), the airline commenced a separate action for contribution. Here, plaintiffs sued both the airline and the union and demonstrated that they were responsible for the discrimination charged (Pet. App. A32-A33; compare *Northwest Airlines*, 451 U.S. at 81, n.5). This Court in *Northwest Airlines* assumed "that the plaintiffs in the *Laffey* litigation could have recovered from either the union or the employer," 451 U.S. at 88, but found that assumption an insufficient basis for providing the airline with a separate cause of action for contribution in the absence of any statutory or federal common law provision for such a separate remedy. 451 U.S. at 90-99. In contrast, here TWA has not

tiffs thus supply the requisite adversity to cure any standing problem. A "justiciable controversy is now before the Court." 459 U.S. at 305.

EEOC and the private plaintiffs are properly before this Court as respondents supporting petitioner on this issue; they may accordingly argue any issue comprehended within the questions presented by the petition in urging reversal of the judgment of the court of appeals. *Perini, supra*; *O'Bannon, supra*. There was accordingly no need for a cross-petition on this issue. In any event, the requirement of a cross-petition is a rule of practice and not jurisdictional. *Langnes v. Green*, 282 U.S. 531, 538 (1931); see *Bryant v. Technical Research Co.*, 654 F.2d 1337, 1341-1342 (9th Cir. 1981) (cross-appeal); *Kicklighter v. Nails by Jannee, Inc.*, 616 F.2d 734, 742-744 (5th Cir. 1980); *Arnold's Hofbrau, Inc. v. George Hyman Construction Co.*, 480 F.2d 1145, 1150 (D.C. Cir. 1973); see also 12 J. Moore, H. Bendix & B. Ringle, *Moore's Federal Practice* ¶ 400.05-5 (2d ed. 1982).

instituted a separate suit, or even sought to bring an additional party defendant into the original suit.³

2. Since we filed our opening brief, three courts of appeals have concluded that, as we submit (Gov't Br. 43-48), the remedies available under the ADEA are broader than those under the FLSA. These courts emphasize that the ADEA authorizes the district court to grant "such legal or equitable relief as may be appropriate to effectuate the purposes of" the Act (29 U.S.C. 626(b)). *Whittlesey v. Union Carbide Corp.*, No. 1142 (2d Cir. Aug. 22, 1984), slip op. 5984-5985 (affirming the award of front pay under the ADEA where reinstatement is not feasible); *Davis v. Combustion Engineering, Inc.*, No. 82-5471 (6th Cir. Aug. 16, 1984), slip op. 11-12 (same); *Equal Employment Opportunity Commission v. Prudential Federal Savings & Loan Association*, No. 82-2444 (10th Cir. Aug. 7, 1984), slip op. 11-15 (same; contrasting narrower FLSA remedy).⁴

³ We suggested in our opposition to TWA's petition for certiorari that "the proper parties to seek further review of this issue would be respondents, the ones who were injured by ALPA's discriminatory conduct" (Br. in Opp. 19). That argument urged a prudential consideration against granting certiorari when those most directly affected by the decision below did not seek further review. It did not, however, suggest that, having decided to review the case, the Court would not have jurisdiction to review the issue, which is properly in this case.

⁴ These cases also reaffirm their Circuits' rejection of the specific intent interpretation of the "wilfulness" requirement for liability for liquidated damages. *Davis*, slip op. 8-9; *Prudential*, slip op. 17-20; cf. *Whittlesey*, slip op. 5983 (violation not willful where "there was excusable uncertainty" over coverage of employees involved). See our opening brief (at 39).

For the foregoing reasons and those discussed in our principal brief, the judgment of the court of appeals should be reversed insofar as it holds ALPA not liable for damages and should be affirmed in all other respects.

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Solicitor General

SEPTEMBER 1984

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ALEXANDER E. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,
Petitioner,
v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A.
PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COM-
MISSION AND AIR LINE PILOTS ASSOCIATION, INTERNA-
TIONAL,
Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
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PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COM-
MISSION AND TRANS WORLD AIRLINES, INC.,
Respondents.

On Writs of Certiorari to the United States
Court of Appeals for the Second Circuit

REPLY BRIEF OF AIR LINE PILOTS ASSOCIATION,
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Petitioner in No. 83-1325
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-997, 83-1325

TRANS WORLD AIRLINES, INC.,
Petitioner,
v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A.
PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COM-
MISSION AND AIR LINE PILOTS ASSOCIATION, INTERNA-
TIONAL,
Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,
v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A.
PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COM-
MISSION AND TRANS WORLD AIRLINES, INC.,
Respondents.

On Writs of Certiorari to the United States
Court of Appeals for the Second Circuit

REPLY BRIEF OF AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL
Petitioner in No. 83-1325
Respondent in No. 83-997

PRELIMINARY STATEMENT

Air Line Pilots Association, International ("ALPA") submits this reply brief as petitioner in No. 83-1325 to respond to arguments by the Equal Employment Opportunity Commission ("EEOC") and private plaintiffs Thurston, Clark and Parkhill ("plaintiffs") as to the application of § 4(f)(1) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(f)(1). As EEOC and plaintiffs also argued in favor of the claim by petitioner Trans World Airlines, Inc. ("TWA") to shift damages to ALPA in their briefs as respondents in No. 83-997, ALPA responds to these arguments to the extent they were not previously advanced by TWA, without conceding that these parties may properly address this issue. *See, infra*, at 8-10.¹

ARGUMENT

I. UNDER § 4(f)(1) TWA COULD RETIRE PILOTS AT AGE 60.

Congress authorized mandatory retirement in § 4(f)(1) of the ADEA, which permits an employer "to take any action otherwise prohibited" by the ADEA (except retaliation) where age is a BFOQ. 29 U.S.C. § 623(f)(1). In the face of plain language, contemporaneous administrative interpretation, and unmistakable legislative history, the EEOC argues that the phrase "any action otherwise prohibited" only describes actions which are "'reasonably necessary' to the demands of the job," so that retirement is not an action permitted by § 4(f)(1).

¹ ALPA's opening brief as petitioner in No. 83-1325 is referred to as "ALPA Pet. Br." ALPA's brief as respondent in No. 83-997 is "ALPA Resp. Br." The EEOC's and the private plaintiffs' briefs in opposition to certiorari are referred to respectively as "EEOC Br. in Opp." and "Pl. Br. in Opp." The EEOC's brief as respondent is "EEOC Br." Private plaintiffs' brief as respondents is "Pl. Br." The EEOC's recent "Reply Memorandum" in No. 83-997 is "EEOC Reply Mem."

EEOC Br. at 28-29. Plaintiffs and the EEOC further assert that forced retirement from a BFOQ job is illegal because it applies the BFOQ to other jobs. Pl. Br. at 22-23; EEOC Br. at 26-27. We respectfully submit that these arguments are without merit.

1. Section § 4(f)(1) presents two distinct questions. The first is *whether* a particular age is a BFOQ "reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1). The phrase "reasonably necessary" is uniformly understood to be one element in deciding this issue. *See, e.g., Criswell v. Western Air Lines, Inc.*, 709 F.2d 544, 550 (9th Cir. 1983), *cert. granted*, — U.S.L.W. — (U.S. Oct. 1, 1984) (No. 83-1545). The second question is *what action* may be taken by an employer when the employee reaches the BFOQ age. Section 4(f)(1) states that an employer may then take "any action otherwise prohibited" by the ADEA. While the BFOQ may not be established unless it is "reasonably necessary," there is no such limit on the action authorized where age is a BFOQ. The EEOC's strained reading inverts the words on the statute, and reduces "any action otherwise prohibited" to mean the sole action "'reasonably necessary' to the demands of the job": that is, an employer may only remove an employee from a BFOQ job and then take any additional action *not* prohibited by § 4(a) of the ADEA. The Court has consistently declined such invitations to judicial legislation. *See* ALPA Pet. Br. at 19; *see also United States v. Lorenzetti*, — U.S. —, 104 S.Ct. 2284, 2291 (1984).

There is no dispute that TWA captains who reach age 60 are subject to a BFOQ. Under § 4(f)(1), TWA may then take the action of requiring a captain's retirement. "[I]n light of the sweeping statutory language, [the EEOC's] argument borders on the frivolous." *Regan v.*

Wald, — U.S. —, 104 S.Ct. 3026, 3034 n.16 (1984) (construing the phrase “any . . . transactions”).

2. While ALPA has demonstrated Congress’ unmistakable intent to allow mandatory retirement under § 4 (f) (1), ALPA Pet. Br. at 9-11, the EEOC regards that legislative history both as “incongruous” and as irrelevant to the issue of “age-based disparities in job transfer rights.” EEOC Br. at 28-29. There is nothing “incongruous” in Congressional selectivity in adopting or expanding remedial legislation.² Moreover, the issue here is not age discrimination in transfer rights; the seniority provisions of the Working Agreement are not age-based. EEOC Br. at 7-8, 25, n.31; Pl. Br. at 21; TWA Br. at 28, n.35; *see* A-26. Rather, the issue presented is whether captains and first officers may be retired and consequently excluded from the seniority system at age 60.³ As to this issue, Congress plainly and unmistakably approved “mandatory retirement” as one of the actions permitted by § 4(f)(1) even if that action otherwise violates the ADEA.⁴ Plainly, the EEOC may not seek

² In the 1978 amendments Congress retained an age ceiling (70), delayed the new upper age limit protection for tenured faculty and persons covered by collective bargaining agreements, and restricted the protection for executives covered by minimum pension terms. Pub. L. No. 95-256, § 2(b), § 3(a), 92 Stat. 189, 189-90 (1978). These actions were no less “incongruous” in the context of Congress’s overall actions than was Congress’s wish to protect existing practices where age is a BFOQ.

³ *See* A-26 (“the employment practice at issue in this lawsuit [is] the severing of age 60 captains from the company”); EEOC Br. at 15 (the issue “is the forced retirement of captains and first officers at age 60, and their resulting exclusion from the seniority system”); Pl. Br. at 16-17 (attacking TWA’s system of “mandatory retirement, severance of seniority rights and refusal to transfer because of age”).

⁴ The proposed Senate amendment to § 4(f)(1) in 1977, specifying that “any action” included “the establishment of a mandatory re-

judicial deference to its interpretation of § 4(f)(1) on the grounds that “Congress never specifically addressed the issue.” EEOC Br. at 29-30.

When Congress enacted the ADEA in 1967, it permitted employers and unions to continue the use of existing age-based employment practices in response to disqualification by a BFOQ. Congress did *not* require the transfer or retraining of employees disqualified by age.⁵ As the Court emphasized in reviewing the EEOC’s challenge to Wyoming’s mandatory retirement of game wardens in *EEOC v. Wyoming*, — U.S. —, 103 S.Ct. 1054 (1983), employers “remain free under the ADEA to continue to do *precisely what they are doing now*, if they can demonstrate that age is a [BFOQ] for the job. . . .” 103 S.Ct. at 1062 (emphasis in original). Indeed, in 1968, the Department of Labor (“DOL”) issued interpretive regulations which acknowledged that § 4(f)(1) authorized the existing practice of compulsory retirement of airline pilots who are subject to the FAA’s Age 60 Rule.⁶ When Congress amended § 4(f)(2) of the ADEA in 1978 to prohibit mandatory retirement under employee benefit plans and seniority systems, it did not

retirement age less than [age 70] . . . where age is a [BFOQ],” S. Rep. No. 493, 95th Cong., 1st Sess. 11, 24 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 504, 514; the 1977 House Committee Report, stating that the ADEA amendments were “not intended [to] prohibit mandatory retirement or other employment practices where age is a [BFOQ],” H.R. Rep. No. 527 (Pt. 1), 95th Cong., 1st Sess. 12 (1977); and 1978 legislative debates, ALPA Pet. Br. at 10-11, all expressed approval of mandatory retirement at an age which is a BFOQ.

⁵ *See* ALPA Pet. Br. at 13. The EEOC and plaintiffs do not argue that Congress was unaware of the obvious variety of employment practices available when employees are not able to keep a job for various reasons. *Id.* at 14.

⁶ 29 C.F.R. § 860.102(d), superseded in 1981 by 29 C.F.R. § 1625.6. *See* 46 Fed. Reg. 47724 (1981).

change § 4(f)(1), but rather confirmed that under present law, once a valid BFOQ is established, "an employer may lawfully require mandatory retirement at that specified age." H.R. Conf. Rep. No. 950, 95th Cong., 1st Sess. 7 (1977), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 528, 529; 123 Cong. Rec. 34,296 (1977). See ALPA Pet. Br. at 11.

In short, under § 4(f)(1), employers remain free to do what they had been doing prior to 1967, and were continuing to do in 1977, in retiring employees disqualified by a BFOQ. This is precisely the assurance given to this Court by the EEOC in *EEOC v. Wyoming*, where the agency argued that "[i]f age is a 'bona fide occupational qualification,' a[n] employer is free to impose a mandatory retirement age. . . ." Neither the EEOC nor plaintiffs square their present reading of § 4(f)(1) with the 1978 Senate amendment, House Report, Conference Committee Report and floor debates—all of which confirm that mandatory retirement is precisely an action authorized by § 4(f)(1), without any suggestion that such action may be taken only if it is not otherwise prohibited by § 4(a) of the ADEA. ALPA Pet. Br. at 9-14.

3. Contrary to respondents' contention, mandatory retirement where age is a BFOQ does not "apply" the BFOQ to other jobs. See EEOC Br. at 27; Pl. Br. at 23-24. If an airline employed crew members only in positions which are subject to a BFOQ, it would still have to decide what action to take concerning captains who reach age 60: it could either place these captains on furlough pending a possible change in FAA regulations or acquisition of aircraft requiring flight engineers, or it could retire them. Either decision applies to the position sub-

⁷ Brief of Appellants EEOC at 13-14, *EEOC v. Wyoming*, 103 S.Ct. 1054 (1984); see 103 S.Ct. at 1071 (Burger, C.J., dissenting).

ject to the BFOQ.⁸ By relying on cases addressing the "job specific" nature of the BFOQ, the EEOC once again confuses the issue of establishing a BFOQ with the action which may be taken on the basis of a BFOQ. As the court observed in *Mahoney v. Trabucco*, 735 F.2d 35, 38 (1st Cir. 1984), a recent "job specific" BFOQ decision, "the whole idea of a BFOQ is to carve out a limited occupational field where an employer may enforce a retirement age requirement, free from the duty of making individual judgments, provided that the . . . [BFOQ is] established." However narrowly the occupational field subject to a BFOQ may be defined, § 4(f)(1) plainly authorizes mandatory retirement where age is established to be a BFOQ for a particular occupational category.

4. The EEOC requests that the Court defer to its litigation position and to DOL "opinion letters," which are contrary to the DOL's 1968 interpretive bulletin expressly acknowledging compulsory retirement as an action permitted by § 4(f)(1) and which were "effectively rescind[ed]" by the EEOC, 46 Fed. Reg. 47,724 (1981). This argument should be rejected.⁹ Deference to agency interpretations "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier pronouncements, and all those

⁸ There is no question here about the right of age 60 former captains to apply for the flight engineer job or any other TWA position on the same basis as any other applicant. Plaintiffs do not seek jobs as applicants; they seek to use accrued seniority to secure flight engineer positions after they turn 60. Whether they can do so is entirely a function of the scope of the actions that the employer may take when a captain turns 60 and in no way "applies" the BFOQ to any other position.

⁹ See *Donovan v. Burger King Corp.*, 675 F.2d 516, 522 (2d Cir. 1982) (no deference to agency litigation position). Moreover, the DOL opinion letters are ambiguous: they either require equal consideration of captains "approaching age 60," with which TWA complies, or prohibit mandatory retirement upon disqualification by a BFOQ, which is the issue in this case.

factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). See *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-43 (1976). Where, as here, the question involves statutory construction dependent on the language of the act as well as its legislative history, deference to agency interpretations is not warranted,¹⁰ especially if it is contrary to the plainly expressed intent of Congress.¹¹

II. NEITHER THE EEOC NOR PLAINTIFFS HAVE ESTABLISHED A BASIS TO ALLOW TWA TO SHIFT ITS DAMAGES TO ALPA

A. The EEOC and Private Plaintiffs Correctly Asked This Court to Reject TWA's Claim to Shift Damages

The EEOC and private plaintiffs opposed TWA's petition for certiorari on all issues, including its effort to shift damages to ALPA. The EEOC stated that TWA's claim was "analogous to a claim for contribution" and "should be rejected." EEOC Br. in Opp. at 19. The EEOC also asserted that "ADEA defendants are jointly and severally liable for violating the Act" (rather than subject to apportionment of damages) and, as a result, the EEOC claimants "will obtain full relief from TWA." *Id.* at 19 n.16.¹²

¹⁰ See, e.g., *Southeastern Community College v. Davis*, 442 U.S. 397, 411-12 (1979); *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 49 (2d Cir. 1976), *aff'd sub nom. Northeast Marine Terminal Co. v. International Terminal Operating Co.*, 432 U.S. 249 (1977).

¹¹ See *Ambook Enterprises v. Time Inc.*, 612 F.2d 604, 610 (2d Cir. 1979), *cert. denied*, 448 U.S. 914 (1980).

¹² Private plaintiffs agreed that any liability is joint and several, that they have no obligation to pursue a claim for damages from ALPA, that they "will now receive full relief from TWA," that TWA's claim is not properly before this Court, and that TWA was in effect seeking contribution without having raised this claim in its pleadings. Pl. Br. in Opp. at 10 & n.14, 11 & n.16.

The EEOC, in an unusual "reply memorandum," has reversed its position and now argues (1) that TWA has a right to apportionment of damages (meaning that the EEOC will *not* collect all of its money from the employer) and (2) that TWA's claim is *not* in the nature of a claim for contribution. EEOC Reply Mem. at 2-3, 4-5. As to proposition (1), the EEOC cites no authority and stands mute as to the contrary authorities on which it relied in opposing certiorari. EEOC Br. in Opp. at 19, n.16. As to proposition (2), the EEOC abandons its prior reliance on *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981), EEOC Br. in Opp. at 19, and instead attempts to distinguish *Northwest Airlines* on the basis of procedural differences between Northwest's and TWA's claims. EEOC Reply Mem. at 4-5. Yet, the question of a right to contribution as asserted by TWA is entirely a function of whether Congress has created that statutory right and, as such, does not depend on the procedural context in which the right to shift damages is asserted. ALPA Resp. Br. at 14.¹³

The EEOC also argues that the private plaintiffs and the agency may now pursue *their* claims for damages against ALPA in this Court. EEOC Reply Mem. at 3-4, n.2. This assertion squarely presents a significant issue in the administration of the Court's docket: May a respondent seek to *reverse* a partially adverse judgment where it *opposed* the petition for certiorari, informing the Court that it was satisfied with the judgment, and did *not* file either a timely cross-petition under Supreme Court Rule

¹³ Of course, the EEOC here *did* sue ALPA, and assuming that the ADEA authorized recovery of damages against ALPA, the agency could have pursued that claim. In that sense, *Northwest Airlines* and *TWA* are different cases. However, the EEOC stopped pursuing its claim, as was its right, after the Second Circuit judgment, and that is why, even procedurally, this case and *Northwest Airlines* are now in the same posture.

19.5 or a timely paper in support of the petition for certiorari under Rule 19.6.

The position advocated by the EEOC is contrary to the holding of *United States v. Reliable Transfer Co.*, 421 U.S. 397, 401, n.2 (1975), and related cases that "absent a cross-petition for certiorari, the respondent may not now challenge the judgment of the Court of Appeals to enlarge its rights thereunder," and would negate Rules 19.5 and 19.6. See ALPA Resp. Br. at 8 n.5. Accordingly, Respondents EEOC and plaintiffs have no right to enlarge a judgment from which they did not seek review in accordance with this Court's Rules.¹⁴ Since TWA has no right to shift its damages to ALPA, ALPA Resp. Br. at 8, the judgment on this aspect of the case should remain undisturbed.

¹⁴ In *Director, Office of Workers Compensation Programs v. Perini North River Associates*, 459 U.S. 297, 103 S.Ct. 634 (1983), the Court held that a respondent, who had filed a timely brief in support of a petition for certiorari in accordance with Supreme Court Rule 19.6 and a brief on the merits in support of the position taken by the petitioner, could seek reversal of an adverse judgment. 103 S.Ct. at 640-41. The significance of *Perini*, therefore, is that a timely Rule 19.6 filing is, for these purposes, equivalent to a timely petition or cross-petition for certiorari. In *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 783-84 n.14 (1980), the Court reasoned that the HEW Secretary, automatically joined as a respondent under former Rule 21(4), could "[i]n that capacity seek reversal of the judgment of the Court of Appeals." The Court obviously meant that the Secretary could do so in the capacity of a respondent who "support[s] the position of the petitioner" within this Court's Rules (otherwise, of course, no "respondent" would ever have to file a petition to secure a reversal). Indeed, the Court held that the Secretary of HEW could not secure review of the propriety of the payment order because he "did not file a petition for certiorari." 447 U.S. 783 n.14. Moreover, the issue pursued by TWA (its effort to shift damages to ALPA) is not the same issue as EEOC's claim (to secure damages from ALPA), see *Northwest Airlines, Inc.*, 451 U.S. at 88 n.20, and EEOC and plaintiffs opposed the petition for certiorari in papers filed beyond the mandatory 20-day limit of Rule 19.6.

The recent decision of the Second Circuit in *EEOC v. CBS, Inc.*, 35 Fair Empl. Prac. Cas. (BNA) 1127 (2d Cir. 1984), poses an additional obstacle to review. The court in *CBS* held that the transfer of ADEA enforcement authority from the Department of Labor to the EEOC was unconstitutional.¹⁵ As the court below in the present case held that "ALPA is liable under 29 U.S.C. § 623(c)(3) to the EEOC plaintiffs who were damaged by its conduct" A-33,¹⁶ any decision by this Court con-

¹⁵ But see *Muller Optical Co. v. EEOC*, 35 Fair Empl. Prac. Cas. (BNA) 1147 (6th Cir. 1984); *EEOC v. Hernando Bank, Inc.*, 724 F.2d 1188 (5th Cir. 1984).

¹⁶ The judgment below "directed that each plaintiff be awarded such relief as he was entitled to against each defendant in accordance with this opinion, after such evidentiary hearing as may be necessary for that purpose." A-35, 39 (emphasis added). The opinion expressly limited ALPA liability "under 29 U.S.C. § 623(c)(3) to the EEOC plaintiffs who were damaged by its conduct." A-33 (emphasis added). Plaintiffs have not sought review of this adverse judgment in this Court. See, e.g., *United States v. Reliable Transfer Co.*, 421 U.S. at 401 n.2.

All three private plaintiffs and four of the EEOC claimants retired prior to "ALPA's actions in signing the post-1978 Working Agreements [executed in July, 1979 (J.A. 147, 337-38)] and in causing TWA to implement other restrictions on the downbidding older captains. . . ." A-33 n.19. The EEOC admits that these additional restrictions were not adopted until 1980. EEOC Br. at 9. These seven claimants (including all private plaintiffs) were not damaged by any conduct of ALPA, see ALPA Resp. Br. at 4 n.4.

Plaintiffs and the EEOC argue that ALPA monetary liability to captains retired prior to July, 1979, should be based on the ALPA v. TWA lawsuit filed August 10, 1978; ALPA contract proposals made in August, 1978; and meetings between ALPA and TWA in the summer of 1978. EEOC Br. at 56; Pl. Br. at 11-13. These assertions are unsupported by the record.

- The Second Circuit expressly declined to consider whether ALPA's filing ALPA v. TWA violated the ADEA. A-33 n.19.
- ALPA's August 24, 1978, contract proposals, made under § 6 of the RLA (J.A. 244, ¶ 14), were immediately rejected by TWA as premature (*id.*, ¶ 15); ALPA refused to discuss these pro-

cerning union liability would be purely advisory under governing Second Circuit decisional law.¹⁷

posals except under § 6 procedures (J.A. 245, ¶ 16); when ALPA made timely proposals to amend the 1977 agreement, items relating to working past age 60 were *not* included. J.A. 158-161. Indeed, the Second Circuit affirmed summary judgment in *ALPA v. TWA* on the grounds, *inter alia*, that ALPA “failed to negotiate over TWA’s retirement policy for flight engineers” in 1979 and 1982. A-15.

- The Second Circuit determined that ALPA *unsuccessfully* opposed TWA’s change in policy and did *not* find that ALPA played any role in TWA’s shift between the July, 1978, Crombie letter and the August, 1978, bulletin. Rather, the Court found that “TWA unilaterally issued” the August, 1978, bulletin, A-9. TWA does not dispute this. The EEOC’s explanation is that Frankum, who replaced Crombie in developing age-60 policy, “did not agree with Crombie’s July 19th letter”; “disavowed [that] letter and . . . proceeded from there”; and “caused TWA to issue” the August bulletin. EEOC Br. at 6. Frankum did not receive any response from or discuss the matter with ALPA. Frankum Tr. at 206; J.A. 100 5A. Another TWA official stated that ALPA “had no impact at all” on the formulation of the August, 1978, bulletin. J.A. 1050-52. The EEOC’s references to meetings between ALPA and TWA in the summer of 1978 are inapposite: the statements made at J.A. 1041-1049 were disavowed during cross-examination, Hilly Tr. 2/10/82 at 138; ALPA’s opposition, on BFOQ grounds, to service past age 60 by any flight engineer (J.A. 1050-56), was known to TWA *prior* to Crombie’s letter (J.A. 1055).

¹⁷ The EEOC alleged jurisdiction under 28 U.S.C. §§ 451, 1337, 1343 and 1345. J.A. 92. As the EEOC is not “authorized to sue” by a constitutional “Act of Congress” to enforce the ADEA, 28 U.S.C. §§ 451 and 1345 are inapplicable. See *Reed v. County Commissioners of Delaware County*, 277 U.S. 376 (1928). As § 7(b) of the ADEA specifically vests enforcement authority in the Department of Labor, not the EEOC, the general jurisdictional grants in 28 U.S.C. §§ 1337 and 1343 add nothing to the power of the federal district courts to entertain an ADEA action by the EEOC. Moreover, absent authority to enforce the ADEA, the EEOC would lack standing to present those issues to the Court. See generally, *Director, Office of Workers Compensation Programs v. Perini North River Associates*, 459 U.S. at 304-305.

B. Neither the EEOC Nor Private Plaintiffs Provide Convincing Reasons to Reverse the Second Circuit on Union Damages

1. The EEOC and private plaintiffs seek to obtain legal relief against unions which violate the ADEA. Yet the EEOC concedes that the enforcement mechanism of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 201-219, was explicitly incorporated in the ADEA, and that the latter statute “is to be enforced under the FLSA. . . .” EEOC Br. at 31 n.35. The EEOC further admits that § 16(b) of the FLSA, as incorporated in the ADEA, only “authorizes employees to sue their *employer* for back pay and liquidated damages.” EEOC Br. at 43 (emphasis added). As § 16(c) provides a representative suit to obtain only the relief provided under § 16(b), ALPA Resp. Br. at 22-23, the government also may obtain legal relief only from an “employer.” The EEOC’s and plaintiffs’ reliance on the general “legal or equitable relief” language in § 7(b) of the ADEA is misplaced, as these terms do not provide additional legal remedies for “amounts owing” beyond what is authorized by incorporated FLSA remedies. See ALPA Br. at 31-32.

Plaintiffs seek to justify legal relief against unions by reading language in § 7(b), which deems a violation of § 4 of the ADEA to be a violation of § 15 of the FLSA, as also intended to make violations of § 15 by “any person” to be “employer violations of FLSA Sections 6 and 7 . . . actionable under FLSA Section 16(b)” Pl. Br. at 39. This construction of § 7(b) of the ADEA and §§ 15 and 16 of the FLSA is contrary to the terms of both statutes. While § 15 prohibits violations by “any person,” defined in FLSA § 3(a) to cover labor organizations, § 16(b) only provides for recovery of “unpaid minimum wages or . . . unpaid overtime compensation” and liquidated damages from an “employer,” expressly defined in FLSA § 3(d) to exclude labor organizations.¹⁸

¹⁸ Congress amended § 16(b) in 1977 to provide legal and equitable remedies against “any employer” which retaliates, Pub. L. No.

By deeming a § 4 violation to be a § 15 violation, and by deeming "amounts owing" to be "unpaid minimum wages and overtime compensation" in § 7(b) of the ADEA, Congress provided that an FLSA § 3(d) "employer" would be responsible for payment of "amounts owing," and both employers and labor organizations would be subject to such injunctive relief as is available in government enforcement actions under § 17 of the FLSA.

2. The EEOC and plaintiffs also argue that § 17 of the FLSA and § 7(c)(1) of the ADEA provide an *equitable* back pay award against unions. Yet, § 17 has been construed to provide monetary relief against employers, not unions. See ALPA Resp. Br. at 26. Moreover, the decision in *Lorillard v. Pons*, 434 U.S. 575 (1978), that the ADEA provides a statutory right to a jury trial was based on this Court's determination that the *exclusive* remedy for "amounts owing" in a private ADEA action is the "legal relief" provided in § 16(b) of the FLSA, as incorporated in the ADEA, rather than the "equitable relief" provided in § 17 of the ADEA.¹⁹

95-151, 91 Stat. 1245 (1977), even though § 15(a)(3) prohibits retaliation by "any person," and prior decisions had construed the "employer" language in § 16(b) not to apply to labor organizations which violated § 6(d)(2), § 15(a)(2) or § 15(a)(3) of the FLSA. See ALPA Br. at 25-26.

¹⁹ In *Lorillard*, this Court found that Congress had adopted decisional law construing § 16(b) of the FLSA to confer a right to a jury trial: (1) by incorporating § 16(b) in the ADEA, 434 U.S. at 580-81 & n.7; and (2) by directing that actions for wages lost as a result of an ADEA violation are to be treated as actions for "unpaid minimum wages or overtime compensation" under the FLSA, 434 U.S. at 582. Even though § 17 of the FLSA expressly authorized an equitable back pay remedy, 434 U.S. at 580 n.7, and § 17 equitable relief was available "in any action" under the ADEA, *id.* at 581, this Court determined that decisional law construing § 17 not to provide for jury trials did *not* apply to a private employee action for reinstatement and unpaid wages. *Id.* at 580 n.7. See *Morelock v. NCR Corp.*, 546 F.2d 682 (6th Cir. 1976), *vacated and remanded*, 435 U.S. 911 (1978).

The argument that § 7(c)(1) of the ADEA authorizes appropriate "legal or equitable relief" in addition to the remedies provided in § 7(b) of the ADEA is similarly foreclosed by *Lorillard*. The terms "legal or equitable relief" do not provide a basis to determine whether the ADEA provides a right to a jury trial, since a private action for unpaid wages may equally be characterized as seeking "legal relief" or an "equitable" back pay award. The only reading of § 7(c)(1) consistent with *Lorillard* is that it creates a private cause of action to obtain the remedies provided in § 7(b) of the ADEA. See ALPA Resp. Br. at 17 n.20.

While Congress expressly modified FLSA procedures and remedies in § 7(c)(1) to provide that "any person aggrieved" (in contrast to "one or more employees," 29 U.S.C. § 216(b)) may bring an action, and in § 7(b) to authorize equitable remedies "in any action," there is no provision in the ADEA which deems "any person" who violates § 4 to be an FLSA "employer," or otherwise provides a remedy against labor organizations for "amounts owing" as a result of a violation of the ADEA. As this Court emphasized in *Lorillard*:

"The selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA."

434 U.S. at 582. Whatever power a court may have to order equitable monetary relief under § 7(b) where a union interferes with the enforcement of the Act,²⁰ or

²⁰ See *Hodgson v. Sagner, Inc.*, 326 F. Supp. 371 (D. Md. 1971), *aff'd sub nom. Hodgson v. Baltimore Regional Joint Board*, 462 F.2d 180 (4th Cir. 1972). The EEOC's suggestion that *Sagner* "held that unions are subject to back pay liability as an equitable remedy when they violate Section 6(d)(2) of the [Equal Pay Act]," EEOC Br. at 46-47 n.52, is far different from its analysis of § 17 and *Sagner* in *Northwest Airlines*, where it argued that remedies for union violations of § 6(d)(2) and § 15(a)(2) of the FLSA are

as a substitute for the equitable remedy of reinstatement, *see, e.g., Whittlesey v. Union Carbide Corp.*, 35 Fair Empl. Prac. Cas. (BNA) 1089, 1091-92 (2d Cir. 1984), there is no statutory basis to supplement the exclusive remedies that Congress provided to recover "amounts owing" for ADEA violations.²¹ *Cf. Northwest Airlines*, 451 U.S. at 93-94.

3. The EEOC argues that Congress merely incorporated the language of FLSA §§ 16 and 17 into the ADEA, but not the policy choices embodied in the remedial scheme of the FLSA, because the elimination of an unfair method of competition is not an express "purpose" of the ADEA. EEOC Br. at 46. This distinction in "purpose" is irrelevant to the scope of the statute's remedial goal of providing restitution to plaintiffs injured by statutory violations. Indeed, the EEOC argues that liquidated damages under the ADEA "should be deemed to serve the compensatory purpose this Court recognized in the FLSA provisions from which they were taken." EEOC Br. at 37. It may similarly be assumed that Congress was aware that the FLSA enforcement scheme was designed to deter employer violations, EEOC Br. at 46, when it adopted FLSA rather than Title VII remedies, especially where legislative history only addresses age-based employment practices by employers.²² In this con-

injunctive relief and, "in flagrant cases [e.g., *Sagner*] . . . [a] commission suit for damages." Brief of EEOC at 18, *Northwest Airlines*, 451 U.S. 77. *See ALPA Resp. Br.* at 28-29 & n.37.

²¹ Contrary to plaintiffs' argument, Pl. Br. at 34-35, the express backpay remedy provided in § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), cannot serve as a basis for judicial implication of a similar ADEA remedy. *See Lorillard v. Pons*, 534 U.S. at 584.

²² As the EEOC acknowledges, the primary purpose of the ADEA was to rectify discrimination "understood to result not from malice or intolerance, but from unfounded assumptions and ignorance regarding the abilities of older workers." EEOC Br. at 35. The evidence before Congress overwhelmingly addresses this problem in terms of employer, not labor organization, discrimination. *See*

text, the EEOC's additional argument, EEOC Br. at 46, that "the employer gains no economic benefit from its own or the union's discrimination against older workers" is simply astonishing. *See EEOC v. Wyoming*, — U.S. —, 103 S.Ct. 1054, 1070 (1983) (Burger, C.J., dissenting) (taking judicial notice of higher costs of employing older workers).²³

4. While the EEOC strains to draw inferences from unrelated portions of the legislative history of the 1967 Act, EEOC Br. at 45-46, neither the Senate Report's characterization of § 10 of the Portal-to-Portal Act,²⁴

ALPA Resp. Br. at 40-41 n.53. An AFL-CIO representative testified that unions had not engaged in age discrimination, *Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 95, 97-98 (1967) (hereinafter "*Senate Hearings*"); neither the EEOC nor plaintiffs have pointed to any evidence of union age discrimination before Congress in 1967. Where Congress considered union conduct to be a substantial problem, as it plainly had a basis to do in Title VII, *see ALPA Resp. Br.* at 40 n.53, it expressly provided monetary remedies against unions, *see, e.g., 42 U.S.C. § 2000e-5(g)*.

²³ Congress adopted § 4(a)(3) of the ADEA *in haec verba* from § 6(d)(1) of the Equal Pay Act, based on AFL-CIO recommendations and testimony concerning underpayment of older workers. *Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 90th Cong., 1st Sess. 412, 418 (1967) (Statement of Kenneth Meiklejohn, Legislative Rep., AFL-CIO) (hereinafter "*House Hearings*"); *Senate Hearings* at 101 (Statement of Andrew J. Biemiller, Legislative Director, AFL-CIO). *See, e.g., EEOC v. Westinghouse Electric Co.*, 725 F.2d 211 (3d Cir. 1983) (denying older workers benefits provided to younger employees); *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981) (refusing to hire more expensive older workers).

²⁴ Section 10 of the Portal-to-Portal Act provides that "no employer shall be subject to any liability or punishment" if it complies in good faith with certain administrative regulations, and that this "defense, if established shall be a bar to the action or proceeding" in which liability is sought. 29 U.S.C. § 259(a).

nor statements made by AFL-CIO representatives²⁵ support the suggestion that Congress intended to provide monetary remedies against unions. The Senate Committee Report statement that § 10 is available to an "employer, employment agency or labor organization" as "a valid defense against a suit under this act," S. Rep. No. 723, 90th Cong., 1st Sess. 10 (1967), simply extends the reach of a § 10 defense to the full extent of the conduct prohibited by § 4 of the ADEA, without any distinction between suits for equitable relief and suits for money damages. Moreover, even assuming that § 10 was intended "to give protection from money judgments" and "does not affect prospective injunctive actions,"²⁶ EEOC Br. at 46, Congress may have intended § 10, as incorporated in the ADEA, to insulate defendants from the economic burdens of non-monetary, equitable remedies for past discrimination, *e.g.*, constructive seniority, restoration of pension rights, or affirmative action in promotions or training.²⁷ While Congress denied an AFL-CIO request to remove unions entirely from the coverage of the Act, there is no logical basis to infer an intent to vary the incorporated provisions of the FLSA, which

²⁵ The AFL-CIO proposed an amendment to have the ADEA enforced under the remedies and procedures provided in the FLSA, *Senate Hearings* at 101; this proposal is substantially similar to § 7(b) as adopted by Congress. The EEOC's argument, EEOC Br. at 45, that FLSA enforcement procedures were not "of critical importance" to the AFL-CIO, is based on a colloquy between Rep. Hawkins and AFL-CIO representative Micklejohn, in which the AFL-CIO took the position that whether the Wage and Hour Division or a separate bureau in the Department of Labor should enforce the ADEA is not "of critical importance." *House Hearings*, at 420-21.

²⁶ The Sixth Circuit Court of Appeals has squarely held that a § 10 defense, if established, precludes both equitable as well as legal liability based on this statutory language. *Marshall v. Baptist Hospital, Inc.*, 668 F.2d 234, 238-39 (6th Cir. 1981).

²⁷ See, *e.g.*, *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375, 102 S.Ct. 3141, 3154-55 (1982).

prohibit certain union conduct, 29 U.S.C. § 215(a)(2), (3).²⁸

5. The ultimate absurdity of the arguments made by the EEOC and plaintiffs is revealed in their requests to have this Court award liquidated damages against ALPA. As a procedural matter, it is inappropriate to request that this Court decide the factual question whether ALPA's asserted violations were willful.²⁹ As a substantive matter, the arguments for liquidated damages are even more strained than the requests for "amounts owing."

²⁸ In testimony to the Senate Committee in March, 1967, AFL-CIO representative Biemiller requested deletion of the Act's application to unions based on the absence of union age discrimination, and a concern that the Act's record keeping requirements would be onerous for local unions. *Senate Hearings* at 98. That request was not made to the House Committee during representative Micklejohn's testimony on August 17, 1967. *House Hearings* at 412, 418.

²⁹ The Second Circuit did *not* find conduct by ALPA to be a "willful" violation of the ADEA, since, in its initial decision, it held that only equitable back pay, rather than legal and liquidated damages, could be recovered against unions. A-34. In *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 1790 (1982), this Court held that the issue of "discriminatory intent" under § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) "is a finding of fact to be made by the trial court." Where "a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings. . . ." 102 S.Ct. at 1791. Similarly, "willfulness" is a finding of fact to be made by the district court in the event that this Court finds that the ADEA provides for liquidated damages against unions.

Moreover, the specific "evidence" of willfulness presented by plaintiffs is specious. See Pl. Br. at 42. ALPA's declaratory judgment action was *not* considered as a basis for liability, A-33 n.19; what ALPA has or has not done in representing pilots employed by airlines other than TWA is irrelevant, and utterly without foundation in this record; ALPA's alleged admission "that [ALPA v. TWA] is motivated by economic, not just safety concerns" consisted only of bringing to the attention of the Court below the economic impact of TWA's 1978 change in policy. See A-17, n.11.

The EEOC acknowledges that liquidated damages against unions are not available in § 16(b) employee actions, but offers no justification for broader remedies in § 16(c) government enforcement actions. The "legal or equitable relief" language of § 7(c) does not authorize the extraordinary remedy of double damages, *see* ALPA Br. at 36-37; § 17 of the FLSA has uniformly been construed not to authorize liquidate damages. *Id.* at 29-30. Even if the policies of Title VII could serve as a basis for union monetary liability in an ADEA action, Title VII makes no provision whatsoever for liquidated damages. Neither the EEOC nor plaintiffs cite any authority for an award of liquidated damages against labor organizations under the ADEA, nor provide any other basis for judicial imposition of this extraordinary relief.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be reversed insofar as it holds that ALPA and TWA have violated the ADEA, or in the alternative, that portion of the judgment which holds that ALPA is not liable for damages should not be disturbed.

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